CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 124.

U. C. GUSS, J. W. McNEAL, W. H. GRAY, AND FRANK H. GREER, APPELLANTS AND PLAINTIFFS IN ERROR,

vs.

J. T. NELSON.

APPEAL FROM AND IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

FILED NOVEMBER 19, 1904.

(19,534.)

(19,534.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 124.

U. C. GUSS, J. W. McNEAL, W. H. GRAY, AND FRANK H. GREER, APPELLANTS AND PLAINTIFFS IN ERROR,

vs.

J. T. NELSON.

APPEAL FROM AND IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

INDEX.

	Original.	Print.
Caption	*a*	1
Return on appeal and writ of error	*b*	1
Citation	*c*	1
Petition for appeal and writ of error	1	2
Assignments of error	3	3
Affidavit as to amount in controversy	7	6
Order for appeal and writ of error	8	7
Writ of error and appeal	10	8
Bond on appeal and error	12	9
Application for certification of statement of facts by the court	14	10
Order for statement of facts	17	12
Petition in error	19	13
Case-made	21	15
Petition	22	15
Exhibit A—Agreement of Nelson, May 28, 1900	24	17
Demurrer to petition	26	18
Order overruling demurrer	27	18
Answer	28	19

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 20, 1905.

	Original.	Print
Reply to answer	34	21
Amended answer	36	22
Reply to amended answer	43	25
Transcript of evidence	47	27
Testimony of J. W. McNeal	47	27
Exhibit A—Agreement of Tulsa Coal and Mining Co. and Kansas and Texas Coal Co	53	31
B—Letter, Nelson to McNeal, Feb. 25, 1901	62	37
C—Letter, McNeal to Nelson, Feb. 27, —	63	38
D—Resignation of Nelson	64	38
E—Proxy, Nelson to Guss, May 28, 1900	64	39
F—Map of coal lands	66	39
G—Letter, Nelson to Childers, Jan. 1, 1897	91	55
Letter, Childers to Nelson, Jan. 15, 1897	92	56
H—Letter, McNeal to Biddle, June 27, 1899	93	57
Testimony of J. D. De Bois	96	58
Exhibit I—Letter, Nelson to De Bois, March 1, 1901	107	65
J—Postal card, Nelson to De Bois, March 29, 1901	108	66
K—Postal card, Nelson to De Bois, March 30, 1901	108	66
L—Letter, Nelson to McNeal, April 17, 1901	109	67
Testimony of J. W. McNeal (recalled)	120	74
John D. De Bois (recalled)	121½	75
U. C. Guss	121½	75
Exhibit M—Statement	124	77
M¹—Missing	124	77
M²—Letter, Shoenfelt to Bank of Indian Territory, August 10, 1900	125	78
Testimony of W. H. Gray	129	81
F. H. Greer	133	85
U. C. Guss (recalled)	147	92
J. Fentress Wisdom	147	92
Exhibit N—Rules and regulations governing mineral leases, the collection and disbursement of revenues, and the supervision of schools in the Indian Territory, under the general provisions of the act of Congress approved June 28, 1898 (30 Stat., 495)	149	93
Testimony of J. T. Nelson	170	105
Exhibit O—Letter, Richards to Nelson, April 24, 1899	184	114
P—Letter, Biddle to Nelson, April 24, 1899	187	115
Q—Letter, Secretary of Interior to Biddle, June 27, 1899	188	116
R—Letter, Biddle to Secretary of Interior, June 23, 1899	191	118
S—Letter, De Bois to Nelson, Feb. 27, 1901	204	126
U—Certificate of principal chief of Muskogee Nation, March 18, 1898	220	136
Charter of Tulsa Coal and Mining Company	223	138

	Original.	Print
Assignment of charter, May 11, 1896	227	141
Agreement of Richards *et al.*, May 11, 1896	228	142
Subscription for stock, &c	229	142
Stockholders' meeting	230	143
By-laws of Tulsa Coal and Mining Company	230	143
Board of directors' meeting, May 19, 1896	232	144
June 1, 1896	233	145
June 5, 1897	234	145
April 4, 1898	234	145
February 21, 1899	235	146
May 10, 1899	236	147
Stockholders' meeting, January 2, 1900	237	147
Board of directors' meeting, January 2, 1900	238	147
June —, 1900	238	148
Testimony of W. R. Biddle	239	148
J. T. Nelson (recalled)	242	151
U. C. Guss (recalled)	245	152
Reporter's certificate	249	155
Opinion	249	155
Judgment	262	162
Motion for new trial	265	164
Order overruling motion for new trial	266	165
Certificate of attorneys to case-made	268	166
Acceptance of service of case-made	268	166
Judge's certificate to case-made	269	166
Endorsement on case-made	270	167
Order taking cause under advisement	271	167
Judgment	272	167
Opinion	273	168
Clerk's certificate	279	176

a U. C. Guss, J. W. McNeal, W. H. Gray, and Frank H. Greer, Appellants,
vs.
J. T. Nelson, Appellee. } No. 1394.

Appeal to the Supreme Court of the United States.

b In the Supreme Court of the United States.

U. C. Guss, J. W. McNeal, W. H. Gray, and Frank H. Greer, Appellants,
vs.
J. T. Nelson, Appellee.

Return on Appeal and Writ of Error.

In pursuance to the command of the appeal and writ of error within, I, Benjamin F. Hegler, clerk of the supreme court of the Territory of Oklahoma, herewith transmit a true and correct copy of the opinion and judgment of the supreme court of the Territory of Oklahoma, together with a true copy of all of the records and proceedings, and all pleadings, papers and files in said cause filed and recorded in my office as clerk of said court in the above entitled cause, and I also transmit herewith the copy of the assignment of error and the original appeal and writ of error, and citation and proof of service thereon in said cause, lately pending in the supreme court of the Territory of Oklahoma, all under my hand and the seal of said court.

Witness my official signature and the seal of said supreme court of the Territory of Oklahoma, at the city of Guthrie in said Territory of Oklahoma this 24" day of October, in the year of our Lord one thousand nine hundred and four.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEYLER,
Clerk of the Supreme Court of the
Territory of Oklahoma.

c In the Supreme Court of the United States.

U. C. Guss, J. W. McNeal, W. H. Gray, and Frank H. Greer, Appellants,
vs.
J. T. Nelson, Appellee. } Citation.

United States of America, *ss:*

The President of the United States to J. T. Nelson, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, to be holden at Washing-

ton, within thirty (30) days from the date hereof, pursuant to an appeal and writ of error filed in the clerk's office of the supreme court of the Territory of Oklahoma, wherein U. C. Guss, J. W. McNeal, W. H. Gray and Frank H. Greer are appellants and plaintiffs in error, and you are appellee and defendant in error, to show cause, if any there be, why judgment rendered against said appellants and plaintiffs in error as in the said appeal and writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John H. Burford, chief justice of the supreme court of the Territory of Oklahoma, this 24" day of October, 1904.

[Seal Supreme Court, Territory of Oklahoma.]

JNO. H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

Attest:
BENJ. F. HEGLER,
Clerk Supreme Court, O. T.

I, the undersigned, one of the attorneys of record for J. T. Nelson in the said cause mentioned in the supreme court of the Territory of Oklahoma, do hereby acknowledge service of the above and foregoing citation this 25" day of October, A. D. 1904.

GEO. S. GREEN,
Attorney of Record for J. T. Nelson,
Appellee and Defendant in Error.

[Endorsed:] No. 1394 U. C. Guss *et al.*, appellants, *vs.* J. T. Nelson, appellee Citation Filed Oct. 26 1904 Benj. F. Hegler, clerk supreme court. By —— ——, deputy.

1 In the Supreme Court of the United States.

U. C. Guss, J. W. McNeal, W. H. Gray, and Frank H. Greer, Appellants,
vs.
J. T. Nelson, Appellee.

Petition for Appeal and Writ of Error.

To the honorable supreme court of the Territory of Oklahoma:

The above named appellants, conceiving themselves aggrieved by the judgment of the supreme court of the Territory of Oklahoma rendered on the 2nd day of September, 1904, affirming a judgment of the district court of Logan county in the Territory of Oklahoma, in rendering and entering a certain judgment for the appellee and

the orders therein for the recovery against the appellants of the sum of five thousand one hundred sixteen 87/100 dollars, with interest thereon, which at the date of the judgment of the supreme court of Oklahoma Territory complained of, on September 2, 1904, amounted to five thousand six hundred fifty dollars, and in overruling the motion of appellants in the trial court for a new trial in said cause and in rendering judgment for the appellee instead of for the appellants in said cause, and in refusing to reverse the judgment of the trial court because of the admission of incompetent, irrelevant and immaterial evidence upon the trial of said cause, and in excluding competent, relevant and material evidence offered by appellants in the trial of said cause, and in not rendering judgment in said cause for the appellants on the evidence introduced on the trial of said cause, and in rendering judgment against the plaintiff- in error and in favor of the defendant in error, does hereby prosecute proceedings upon appeal and in error from the said orders, judg-
2 ments and decrees of the supreme court of the Territory of Oklahoma to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith and made a part hereof, and they pray that an appeal and writ of error may be allowed and that a transcript of the record, proceedings and papers upon which said judgment of affirmance was made, duly authenticated by the clerk of this court, may be sent to the Supreme Court of the United States, and that the court may fix the supersedeas bond of the said appellants, to be given within a reasonable time, and enter the necessary orders herein, allowing and effecting proceedings upon appeal and in error, and that the said judgment of the supreme court of the Territory of Oklahoma be reversed and the judgment and decree be made, remanding said cause for the further proceedings upon appeal and in error in the supreme court of the Territory of Oklahoma and in the trial court, and for a new trial therein, and that such further decree may be made as to said honorable court may seem legal, just and proper.

FRANK DALE AND
A. G. C. BIERER,
Attorneys for Appellants and Plaintiffs in Error.

Said petition is endorsed: No. 1394—U. C. Guss *et al.*, *vs.* J. T. Nelson—Petition for appeal and writ of error—Filed Oct. 24, 1904, Benj. F. Hegler, clerk supreme court, by Jessie Pardoe, deputy.

3 In the Supreme Court of the United States.

U. C. GUSS, J. W. MCNEAL, W. H. GRAY, and FRANK H. GREER, Appellants,
vs.
J. T. NELSON, Appellee.

U. C. Guss, J. W. McNeal, W. H. Gray and Frank H. Greer, the above named complainants and appellants, hereby assign errors on

the judgment and decree of the supreme court of the Territory of Oklahoma in the above entitled cause, dated the 2nd day of September, 1904, in the following particulars:

First. Because said court erred in the ruling and decision made by it that under the contract on which these appellants were sued by J. T. Nelson, appellee, it was necessary for them to exercise the option not to purchase the stock therein provided for by rescinding the said contract and turning back the property optionally purchased on or before March 4, 1901.

Second. Because said court erred in ruling and holding that the contract sued upon was for sale of mining stock subject to the right of plaintiffs in error below, appellants here, to exercise their option either of paying the remainder of the purchase price or to rescind the contract and returning the property; whereas, the court should have held that said contract was a forfeiture contract, under which the said U. C. Guss, J. W. McNeal, W. H. Gray and Frank H. Greer, appellants, paid the sum of five hundred ($500.00) dollars, and which sum was paid as earnest money, to be forfeited in case the balance of the payment provided by the contract was not paid; and that having failed to pay the balance of forty-five hundred ($4500.00) dollars, as provided for in the contract, that they had forfeited to J. T. Nelson the five hundred ($500.00) dollars paid by them.

4 Third. Because said court erred in ruling and deciding that when the appellants failed to exercise their right to return the property, the subject of the contract, by the time stipulated in the contract, their right of election not to take the property was discharged and their promise to pay became absolute.

Fourth. Because said court erred in holding and deciding that the rescission of the contract sued upon by appellee J. T. Nelson in this cause was necessary in order to relieve the appellants from their conditional promise to pay the balance of the sum of money therein stipulated; whereas, no rescission whatever was necessary on the part of the appellee.

Fifth. Because said court erred in ruling and deciding that under the contract sued upon by J. T. Nelson, appellee, in his suit against the appellants in this cause, some affirmative act was necessary on the part of the appellants in order to exercise their election, under their optional contract, not to purchase the property, the subject of the contract.

Sixth. Because said court erred in ruling and holding and adjudging that the failure of the appellants to return the property, the subject of the contract in controversy, on or before the time stipulated, the 4th of March, 1901, bound them to the payment of the balance of the purchase price under said contract, of forty-five hundred ($4500.00) dollars.

Seventh. Because said court erred in holding that said contract required appellants to return the property on the 4th day of March, 1901, and that because of their failure to return said property they

were to be held liable for the balance of the purchase price stipulated in the contract; whereas, the court should have held that such failure entailed upon them the forfeiture of the earnest money paid upon said contract, and as therein provided.

5 Eighth. Because said court erred in finding and holding these appellants liable to the appellee for the sum of money sued for, solely because of their failure to return the stock, records and seals of said corporation on the 4th of March, 1901; whereas, there is nothing to show that on or after the 4th of March, 1901, the said appellee ever demanded or requested the return of said property, and the undisputed evidence does show that the same was returned and sent to the said J. T. Nelson shortly after said date, and he refused to receive the same.

Ninth. Because said court erred in ruling and holding that in the contract sued upon in this cause in the courts of Oklahoma, there is an express provision giving plaintiffs in error there, appellants here, the right to rescind, and that right is a mere option of the party, in this: That said holding and decision shows that said court misconstrued said contract and took the wrong theory thereof, and held that a recission was necessary to relieve appellants from the payment of the sum stipulated, forty-five hundred ($4500.00) dollars; whereas, their mere failure to meet the terms of the contract to pay the sum of forty-five hundred ($4500.00) dollars would, by its terms, relieve them from further liability, but entail a loss and forfeiture upon their part, of the five hundred ($500.00) dollars paid on said contract.

Tenth. Because said court erred in its ruling and decision that under the contract sued upon by appellee in this cause, it was the duty of the appellants to return or offer to return the property, and to give notice of their disaffirmance of the contract, and to return said property to the appellee at some other place than the place where appellants received it, to wit, at the city of Guthrie.

6 Eleventh. Because said court erred in ruling and holding that it was the duty of appellants under the contract sued upon in this case, to elect to rescind said contract and to notify the appellee (defendant in error in the Oklahoma court) of such election, and to return or offer to return to the place from which they received it, all of the certificates of stock, books, contracts, seals and other paraphernalia pertaining to the property and business and that because of such failure, they became liable for the remainder of the purchase price under said contract, to wit, the sum of forty-five hundred ($4500.00) dollars, with interest thereon.

Twelfth. Because said court erred in ruling, holding and adjudging that the judgment entered by the district court of Logan county, Oklahoma Territory, was correct and in affirming said judgment.

Wherefore, the appellants and plaintiffs in error pray that the judgment of the supreme court of the Territory of Oklahoma herein may be reversed, annulled and held for naught, and that the appellants and plaintiffs in error may be restored to all things which they

have lost by occasion or on account of said judgment, and that the errors of the supreme court of the Territory of Oklahoma may be fully corrected, and that judgment be entered dismissing the cause of action of the appellee and defendant in error.

FRANK DALE AND
A. G. C. BIERER,
Attorneys for Appellants and Plaintiffs in Error.

Endorsed on back as follows: No. 1394—U. C. Guss *et al.*, *vs.* J. T. Nelson—Assignments of error on appeal—Filed Oct. 24, 1904, Benj. F. Hegler, clerk supreme court, by Jessie Pardoe, deputy.

7 In the Supreme Court of the United States.

U. C. GUSS, J. W. MCNEAL, W. H. GRAY, and FRANK H. GREER, Appellants,
vs.
J. T. NELSON, Appellee.
} Affidavit.

TERRITORY OF OKLAHOMA, Logan County, } *ss*:

U. C. Guss, J. W. McNeal, W. H. Gray, and Frank H. Greer, being first duly sworn, say that they are the appellants in the above entitled cause, and that they and each of them are residents of the city of Guthrie, Logan county, Oklahoma Territory, and that they know what the controversy in the above entitled cause is; that the cause of action of J. T. Nelson and his judgment therein are for the recovery of money, and that the judgment of the said J. T. Nelson, when the same was rendered in the district court of Logan county, Oklahoma Territory, on the 19th day of Feb'y, 1903, was for the sum of $5116 87/100 dollars, and the said judgment, with the accrued interest, amounted, when the judgment and decision in this cause was rendered and entered by the supreme court of the Territory of Oklahoma on September 2, 1904, to $5650.00 *dollars*; that the amount involved in this controversy therefor exceeds five thousand ($5,000.00) dollars, exclusive of costs and interest, and that no part of such judgment has been paid or remitted.

U. C. GUSS.
J. W. McNEAL.
FRANK H. GREER.

Subscribed and sworn to before me this 24th day of October, 1904.
N. MELVILLE CARTER,
[SEAL.] Notary Public.

My commission expires July 14, 1903.

Endorsed: No. 1394—U. C. Guss *et al.*, *vs.* J. T. Nelson—Affidavit as to amount involved—Filed Oct. 24, 1904, Benj. F. Hegler, clerk supreme court, by Jessie Pardoe, deputy.

8 In the Supreme Court of the United States.

U. C. Guss, J. W. McNeal, W. H. Gray, and Frank H. Greer, Appellants,
vs.
J. T. Nelson, Appellee.
} Order.

Now on this 24" day of October, A. D. 1904, come the appellants and plaintiffs in error, by their attorneys Frank Dale and A. G. C. Bierer, and file herein and present to the court their petition for appeal and writ of error and assignments of error, praying an allowance of an appeal and writ of error, and that the transcript of the record and proceedings, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the court and the undersigned chief justice thereof, does allow the appeal and writ of error, and directs and commands the clerk of this court to transmit to the said Supreme Court of the United States, a true and certified transcript of the records, and all papers, files and proceedings herein.

It is further ordered that the appellants and plaintiffs in error shall give bond in the sum of seven thousand dollars, to be approved by the clerk of this court, within twenty (20) days from this date, and upon so doing, these proceedings upon appeal and in error and the said bond shall operate as a supersedeas and as a stay of all proceedings herein in the supreme court of the Territory of Oklahoma and in the district court of Logan county, Oklahoma Territory, pending said causes in the Supreme Court of the United States.

JNO. H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

Attest:
BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma,
By JESSIE PARDOE, Deputy. [SEAL.]

9 Said order is endorsed on back as follows, to wit:

No. 1394—U. C. Guss *et al. vs.* J. T. Nelson—Order allowing appeal and writ of error—Filed Oct. 24, 1904, Benj. F. Hegler, clerk supreme court, by Jessie Pardoe, deputy.

10 In the Supreme Court of the United States.

U. C. Guss, J. W. McNeal, W. H. Gray, and Frank H. Greer, Appellants,
vs.
J. T. Nelson, Appellee.

Writ of Error and Appeal to the Supreme Court of the Territory of Oklahoma.

The United States of America, *ss:*

The President of the United States to the honorable supreme court of the Territory of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said court before you, in which the amount in controversy exceeds more than five thousand ($5,000.00) dollars, exclusive of interest and costs, and wherein it appears that a manifest error hath happened to the great damage of the said U. C. Guss, J. W. McNeal, W. H. Gray and Frank H. Greer as by their complaint and assignment of errors appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice be done to the parties aforesaid in this behalf, command you that judgment therein be given; that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States with this writ, so that you have the same at Washington on the 23d day of November next in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States and of said Territory should be done.

11 It is further ordered and commanded that mandate and execution of said judgment of the supreme court of the Territory of Oklahoma be stayed until a final determination of this cause upon condition that the said appellants and plaintiffs in error enter into a good and sufficient undertaking to the appellee and defendant in error in the sum of seven thousand dollars, conditioned as required by law within twenty (20) days.

Witness, the Honorable John H. Burford, chief justice of the supreme court of the Territory of Oklahoma this 24" day of October, in the year of our Lord one thousand nine hundred and four.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma.

Allowed:
JNO. H. BURFORD,
Chief Justice of the Supreme Court
of the Territory of Oklahoma.

[Endorsed:] No. 1394 U. C. Guss *et al. vs.* J. T. Nelson Writ of error and appeal to supreme court of Oklahoma Territory. Filed Oct. 24 1904 Benj. F. Hegler clerk supreme court By Jessie Pardoe deputy.

12 In the Supreme Court of the United States.

U. C. Guss, J. W. McNeal, W. H. Gray, and Frank H. Greer, Appellants,
vs.
J. T. Nelson, Appellee.

Bond on Appeal and Error.

Know all men by these presents, that we, U. C. Guss, J. W. McNeal, W. H. Gray and Frank H. Greer, as principals, and Robert Sohlberg and A. L. Cockrum, as sureties, are held and firmly bound unto J. T. Nelson in the full and just sum of seven thousand dollars, to be paid to the said J. T. Nelson, his certain attorney, administrator or assigns, to which payment well and truly to be made we bind ourselves, our executors, administrators and assigns jointly and severally by these presents.

Sealed with our seals and dated this 24" day of October, A. D. 1904.

Whereas, lately at a term of the supreme court of the Territory of Oklahoma, in a suit pending in said court, wherein U. C. Guss, J. W. McNeal, W. H. Gray, and Frank H. Greer were plaintiffs in error and J. T. Nelson was defendant in error, judgment was rendered in said court on the 2nd day of September, A. D., 1904, in favor of said defendant in error against said plaintiffs in error, and the said plaintiffs in error having obtained an appeal and writ of error to and from the Supreme Court of the United States for a reversal of said judgment, and an order of the supreme court of the Territory of Oklahoma, staying mandate and execution of said judgment upon the giving by appellants and plaintiffs in error of a good and sufficient bond in the sum of seven thousand dollars, and citation having been issued upon said appeal and writ of error and served
13 upon J. T. Nelson, appellee and defendant in error, citing and admonishing the said appellee and defendant in error to be and appear at the Supreme Court of the United States to be holden at the city of Washington the first Monday of December next.

Now, the condition of the above obligation is such that if the said U. C. Guss, J. W. McNeal, W. H. Gray and Frank H. Greer shall prosecute their said appeal and writ of error to effect, and answer all damages and costs if they fail to make their appeal good, then this obligation to be void, otherwise to remain in full force and virtue.

Witness our hands this 24" day of October, A. D. 1904.

U. C. GUSS,
J. W. McNEAL,
W. H. GRAY,
FRANK H. GREER,
Principals.
ROB"T SOHLBERG,
A. L. COCKRUM,
Sureties.

TERRITORY OF OKLAHOMA, } ss:
Logan County, }

Robert Sohlberg and A. L. Cockrum, being duly sworn, say that they and each of them are worth the sum of ten thousand ($10,000) dollars over and above all just debts, liabilities and exemptions.

ROB"T SOHLBERG.
A. L. COCKRUM.

Subscribed and sworn to before me this 3rd day of November, 1904.

N. MELVILLE CARTER,
[SEAL.] Notary Public.

My commission expires July 14, 1908.

Endorsed on back as follows: 1394—U. C. Guss, *et al. vs.* J. T. Nelson—Supersedeas bond—The within bond approved by me this November 3, 1904—Benj. F. Hegler, clerk supreme court—Filed Nov. 3, 1904—Benj. F. Hegler, clerk supreme court.

14 In the Supreme Court of the United States.

U. C. GUSS, J. W. McNEAL, W. H. GRAY, and FRANK H. GREER, Appellants,
vs.
J. T. NELSON, Appellee.

Application for Certification by the Court of a Statement of Facts of the Case in the Nature of a Special Verdict.

Come now the appellants in the above entitled cause, and show to the supreme court of the Territory of Oklahoma that on the 24 day of October, 1904, they filed their petition in the supreme court of the Territory of Oklahoma for an appeal of said cause to the Supreme Court of the United States, and presented the same to the Honorable John H. Burford, chief justice of said supreme court of Oklahoma Territory, and obtained an order for said appeal and for the

issuance of citation and for a stay of proceedings therein, and for the certification of said cause by the clerk of the supreme court of Oklahoma to the Supreme Court of the United States, and that the clerk is preparing a transcript of the proceedings and judgment and decree in said cause to the Supreme Court of the United States, in accordance with the laws of said appeal.

Your appellants further show to the court that the said cause was tried upon issues joined in the district court of Logan county, Oklahoma Territory, from whence the appeal was taken to the supreme court of the Territory of Oklahoma, and upon said trial, evidence was offered by both parties, but that no special findings of fact and no special verdict was made; that some of the questions raised in said cause, and which questions are material, will involve a consideration of the facts of said cause by the Supreme Court of the
15 United States, and the appellants will, under the law and the practice of said court, be unable to present the same unless a statement of the facts of the case in the nature of a special verdict and also the rulings of the court on the admission or rejection of evidence excepted to shall be made and certified by this court and transmitted to the Supreme Court of the United States, together with the transcript of the proceedings and judgment and decree appealed from; that justice, and an opportunity be given to the appellants to fully present their cause requires that such statement of facts of the case in the nature of a special verdict be made and certified by this court, and transmitted to the Supreme Court of the United States; that this application is not made for the purpose of delay, but in order that justice be done the appellants.

Wherefore, the appellants pray the supreme court of Oklahoma to make a statement of facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence excepted to, and certify the same and transmit the same with the transcript of the proceedings and judgment and decree appealed from to the clerk of the Supreme Court of the United States, and that inasmuch as the supreme court of the Territory of Oklahoma had adjourned before this appeal was taken, and will not, under the usual practice of said court, and the duties of the judges in their respective districts requiring them to hold district courts in their respective districts at this season of the year again be in session until about January 1, 1905, that if said court cannot convene at once for the purpose of making said statement of facts, then an order be made by the chief justice, directing the clerk of the supreme court of the Territory of Oklahoma to transmit to the clerk of the Supreme Court of the United States a transcript of the proceedings in said
16 cause within the time required by law, and that the said statement of facts of the case in the nature of a special verdict be made and certified by the supreme court of the Territory of Oklahoma as soon as said court is in session, and that the same be then promptly transmitted to the clerk of the Supreme Court of the United

States to be filed with and become a part of the records and proceedings in said cause.

FRANK DALE,
A. G. C. BIERER,
Attorneys for Appellants.

TERRITORY OF OKLAHOMA, Logan County, } ss:

A. G. C. Bierer being first duly sworn, says that he is counsel and one of the attorneys for the plaintiffs in the above entitled cause; that he has read and knows the facts stated in the above and foregoing application and the statements therein contained are true.

Affiant further says that said application is not made for the purpose of delay, but that justice be done the appellants.

A. G. C. BIERER.

Subscribed and sworn to before me this 10 day of November, 1904.

[SEAL.]

BENJ. F. HEGLER,
Clerk of the Supreme Court
of Oklahoma Territory.

Endorsed: No. 1394—In the Supreme Court of the United States—U. C. Guss, J. W. McNeal, W. H. Gray and Frank H. Greer, appellants, *vs.* J. T. Nelson, appellee—Application for certification by the court of a statement of facts of the case, in the nature of a special verdict. Dale & Bierer, attorneys for appellants—Filed Nov. 10, 1904—Benj. F. Hegler, clerk supreme court.

17 In the Supreme Court of the United States.

U. C. GUSS, J. W. MCNEAL, W. H. GRAY, and FRANK H. GREER, Appellants,
vs.
J. T. NELSON, Appellee. } Order.

Now on this 10th day of November, 1904, come the appellants and made application to the supreme court of the Territory of Oklahoma to make a statement of the facts of the above cause in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence as excepted to in the trial of said cause in the district court of Logan county, Oklahoma Territory, and certify the same and transmit the same to the Supreme Court of the United States, together with the transcript of the proceedings and judgment and decree rendered by the supreme court of Oklahoma in said cause, and upon consideration of said application, it is by the undersigned chief justice of the supreme court of the Territory of Oklahoma considered and adjudged, that,

Whereas, appellants' petition for appeal was filed and allowed in said cause to the Supreme Court of the United States on the 24th day of October, 1904, and the same must be filed in the Supreme Court of the United States within thirty (30) days from that date; and,

Whereas, the supreme court of the Territory of Oklahoma adjourned *sine die*, its regular June, 1904, term of said court, and the judges of said court are all engaged in holding terms of district court in their respective districts as by law required, and will remain so engaged until about the 1st of January, 1905, when the supreme court of the Territory of Oklahoma will again assemble at the capitol of said Territory in the city of Guthrie, Oklahoma Territory, for its regular January session of said court;

18 It is therefore considered and ordered that the clerk of the supreme court of Oklahoma Territory do transmit the transcript of the proceedings in said cause, and the judgment and decree rendered therein by the supreme court of the Territory of Oklahoma to the clerk of the Supreme Court of the United States within the thirty (30) days required by law, and that when the supreme court of Oklahoma Territory is in session in January, 1905, the statement of the facts of said case in the nature of a special verdict, and also the rulings of the court on the admission and rejection of evidence excepted to shall be made and certified by said court, and transmitted to the clerk of the Supreme Court of the United States, to be filed with the transcript of the proceedings and judgment and decree in said cause, as certified by the clerk of the supreme court of the Territory of Oklahoma.

JNO. H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

Attest:
BENJ. F. HEGLER,
[SEAL.] Clerk Supreme Court of the Territory of Oklahoma.

Endorsed: No. 1394—In the Supreme Court of the United States—U. C. Guss, J. W. McNeal, W. H. Gray and Frank H. Greer, appellants, *vs.* J. T. Nelson, appellee—Order—Filed Nov. 10, 1904—Benj. F. Hegler, clerk supreme court.

19 In the Supreme Court of the Territory of Oklahoma.

U. C. GUSS, J. W. MCNEAL, W. H. GRAY, and FRANK H. GREER, Plaintiffs in Error,
vs.
J. T. NELSON, Defendant in Error.

Petition in Error.

The said U. C. Guss, J. W. McNeal W. H. Gray, and Frank H. Greer, plaintiffs in error, complain of said defendant in error for that the said

defendant in error, on February 20th, 1903, at the regular, February term of the district court of Logan county, said Territory, recovered a judgment by the consideration of said court, against the said plaintiffs in error in a certain action then pending in said court, wherein the said J. T. Nelson was plaintiff and the said plaintiffs in error were defendants. The original case-made in said cause, duly certified and attested, is hereunto attached, marked "Exhibit A" and made a part of this petition in error; and the said plaintiffs in error aver that there is error in said record and proceedings in this, to wit:

1. Said court erred in overruling the demurrer of defendants below to plaintiff's petition.

2. Said court erred in overruling the motion of plaintiffs in error for a new trial.

3. Said court erred in not rendering judgment for plaintiff- in error.

4. Said court erred in rendering judgment in favor of plaintiff below.

5. Said court erred in admitting evidence on the part of the defendant in error.

6. Said court erred in refusing and ruling out competent and legal evidence on the part of the plaintiff- in error.

7. Said court erred in holding and deciding that plaintiffs in error were bound to restore or offer to restore to defendant in error any earnings which accrued on the stock involved in said action during the time that it remained in the possession of plaintiffs in error and prior to the time when the contract in question matured.

Wherefore, plaintiffs in error pray that said judgment so rendered may be reversed, set aside and held for naught and that a judgment may be ordered to be rendered in favor of plaintiffs in error and against defendant in error and that plaintiffs in error be restored to all rights which they have lost by the rendition of said judgment and for such further relief as to the court may seem just and proper.

JOHN D. DE BOIS &
COTTERAL & HORNOR,
Attorneys for Plaintiffs in Error.

Filed Sep. 21, 1903.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, Deputy.

GUTHRIE, O. T., Sept. 2, 1903.

We hereby waive the issuance and service of summons in this cause and enter the voluntary appearance of defendant in error.

W. R. BIDDLE,
GEO. S. GREEN,
SELWYN DOUGLAS,
Attorneys for J. T. Nelson, Def't in Error.

Filed Sep. 21, 1903.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, Deputy.

21 In the District Court of Logan County, Oklahoma Territory.

J. T. NELSON, Plaintiff,
vs.
U. C. GUSS, W. H. GRAY, J. W. MCNEAL, and F. H. GREER, Defendants.

Case Made.

Be it remembered, that heretofore, to wit, on the 6th day of April, 1901, there was filed in the above entitled court, the petition of the plaintiff herein, against the defendants, and causing a summons to be issued thereon, which said petition is in the words and figures following, to wit:

Filed Sep. 3, 1903.

THOS. A. NEAL,
Clerk District Court.

Filed Sep. 21, 1903.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, Deputy.

22 In the District Court of Logan County, Oklahoma Territory.

J. T. NELSON, Plaintiff,
vs.
U. C. GUSS, W. H. GRAY, J. W. MCNEAL, and F. H. GREER, Defendants. } Petition.

Said plaintiff for cause of action against said defendants says that on and prior to the 28th day of May, 1900, said plaintiff was the owner of a large number of shares of the capital stock of the following ten coal companies located in the Creek Nation: Sapulpa, Choctaw, Catoosa, Wewoka, Red Fork, Neyaka, Concharty, Tulsa, Car Creek and Broken Arrow Mining Companies. And was in possession having an interest therein of a large number of shares in said companies.

That he was also on said day a director in each of said companies and secretary of each of said companies and as such director and secretary he had possession of the records, seals and other property belonging to said companies; that the possession of said property was important.

Plaintiff further says that on said 28th day of May, 1900, he entered into a contract in writing with said defendants to the effect that said plaintiff would turn over to said defendants 25 per cent. of the capital stock of said companies and would turn over the records, seals and other property of said companies including all the records that in any way belonged to said companies; that he would also give said defendant U. C. Guss his proxy as director in each of the above named companies or resign as such director.

23 Said contract also provided that in consideration of the delivery of said property to said defendants and his resignation as aforesaid, that said defendants would pay him, plaintiff, $500 in cash; the $500 to be considered an option on all of said property until the 4th day of March, 1901, and that on that day the said defendants were to pay to said plaintiff an additional sum of $4,500 or in lieu thereof to turn back to said J. T. Nelson all the property delivered by him to said defendants. A copy of said contract is hereto attached, marked "Exhibit A" and made a part of this petition; reference being made to the terms thereof.

Plaintiff further says that said defendants paid to said plaintiff the sum of $500 and that said plaintiff duly complied with all of the terms of said contract to the satisfaction of said defendants, turning over to them the stock, records, seals, and other property belonging to said companies.

Plaintiff further says that said defendants failed to return said property to him on the 4th day of March, 1901, and refused to return said property to him but have converted the same to their own use and have failed and neglected to pay said $4,500 on said 4th day of March, 1901, as they were bound to do by said contract. That there is now due from said defendants to said plaintiff the sum of $4,500 with interest thereon from the 4th day of March, 1901.

Wherefore, plaintiff demands judgment for the sum of $4,500 with interest thereon from March 4th, 1901, and costs.

W. R. BIDDLE &
DOUGLAS & DOUGLAS,
Att'ys for Plaintiff.

24 To the clerk:

Please issue summons in the above entitled action directed to the sheriff of Logan county, Oklahoma Territory, returnable according to law; endorse summons that plaintiff claims $4,500 with interest from March 4, 1901.

W. R. BIDDLE &
DOUGLAS & DOUGLAS,
Att'ys for Plaintiff.

EXHIBIT A.

Memorandum of agreement made and entered into this 28th day of May, 1900, to wit, as follows: J. T. Nelson agrees on his part to turn over 25% of the capital stock of the following coal companies located in the Creek Nation, to wit: Sapulpa, Choctaw, Catoosa, Wewoka, Red Fork, Neyaka, Concharty, Tulsa, Car Creek and Broken Arrow Mining Companies, to the following persons, U. C. Guss, W. H. Gray, F. H. Greer and J. W. McNeal. The consideration of the delivery under which the above listed stock and other stock as hereinafter described is as follows: This also includes the delivery of the records belonging to each of said above named companies, the seals and all other records that in any way belong to any of said companies. A payment of $500 is to be made in cash upon delivery of the above named property, and additional property in the way of stock hereinafter listed. The $500 is to be considered an option on all said property until the 4th day of March, 1901. At that date the above named parties are to pay to Nelson an additional sum of $4500.00 (four thousand five hundred dollars) or in lieu thereof to turn back to said Nelson all the property delivered by him. In addition to the above mentioned 25 % of the capital stock aforesaid, which the said J. T. Nelson represents he
25 owns in his own right, he agrees to turn over and deliver enough more stock to make the aggregate sum of stock delivered by him under this contract as follows:

Sapulpa	1210	shares
Choctaw	369	"
Catoosa	369	"
Wewoka	369	"
Red Fork	369	"
Neyaka	368	"
Concharty	369	"
Tulsa	319	"
Car Creek	369	"
Broken Arrow	369	"

The $500.00 above mentioned is to be earnest money to be forfeited in case the balance of payment is not paid. Nelson also agrees to give U. C. Guss his proxy as director in each of the above named companies until such time as it may be convenient for him to resign and Guss or some one else be elected to fill the vacancy.

J. T. NELSON.

U. C. GUSS.
W. H. GRAY.
J. W. McNEAL.
F. H. GREER.

Said petition is endorsed: No. 3236—J. T. Nelson, plaintiff, *vs.* U. C. Guss, W. H. Gray, J. W. McNeal and F. H. Greer, defendants—Petition—Filed Apr. 6, 1901, M. C. Hart, clerk district court.

26 Thereafter and on the 12th day of April, 1901, the defendants filed their demurrer to the petition of the plaintiff, which demurrer is in words and figures as follows, to wit:

In the District Court in and for Logan County, O. T.

J. T. NELSON, Plaintiff,
vs.
U. C. GUSS, W. H. GRAY, J. W. MCNEAL, & F. H. GREER, Def't-. } No. 3236.

Comes the within named defendants, and demur to plaintiff's petition for the following causes:

1st. Because the petition fails to state facts sufficient to constitute a cause of action.

2nd. Because plaintiff fails to state what specific property was withheld from him on the 4" day of March, 1901, and that same at the commencement of his action was withheld; and that he had made proper demands for same and same was refused him.

3rd. Because the petition fails to show proper party plaintiff.

Wherefore, plaintiff (defendants?) pray for a dismissal of plaintiff's petition.

JOHN D. DE BOIS,
For Defendants.

Endorsed: No. 3236—In the district court in and for Logan county—O. T., J. T. Nelson, plaintiff, *vs.* U. C. Guss, W. H. Gray, J. W. McNeal & F. H. Greer, def't-. Demurrer to plaintiff's petition—Filed Apr. 12, 1901, M. C. Hart, clerk dist. court.

27 Thereafter and on the 15th day of November, 1901, said cause came on to be heard upon the demurrer of the defendants to the plaintiff's petition; and the court after argument of counsel, and being advised in the premises, makes the following order, to wit:

J. T. NELSON
vs.
U. C. GUSS ET AL. } 3236.

Comes now the plaintiff and defendants by their respective attorneys and the defendants submit a demurrer so the petition herein, and the court being fully —

It is by the court ordered that said demurrer be and it is hereby overruled, to which ruling of the court the defendants duly excepted and except.

28 Thereafter and on the 27th day of November, 1901, the defendants filed their answer to the petition herein, which said answer, with the endorsements thereon, is in the words and figures following, to-wit:

In the District Court of Logan County, Oklahoma Territory.

J. T. NELSON, Plaintiff,
vs.
U. C. GUSS, W. H. GRAY, J. W. MCNEAL, and F. H. Greer, Defendants. } Answer.

Come the defendants in the within entitled cause and deny each and every material allegation set out in plaintiff's petition, except what — hereafter admitted.

The defendants herein admit that on the 28th day of May, 1900, the plaintiff, J. T. Nelson, was in possession of the property set out in plaintiff's petition, and he agreed to sell said shares of stock and turn over the records, seals and other property belonging to said companies, which records, seals and other property plaintiff held as secretary and director of said companies.

And defendants state that on the 28th day of May, 1900, plaintiff entered into a written contract with said defendants that he
50
would turn over twenty-five per cent. of the capital stock of said companies, and would turn over the records, seals and other property of said companies that he held as secretary and director, and that he would give defendant U. C. Guss his proxy as director and that he would resign as such director, and said property was turned over and said Nelson did resign as such director and secretary.

29 They state that in consideration thereof they were to pay, and did pay, plaintiff, J. T. Nelson the sum of $500.00, to be considered an option or earnest money on said property until the 4th day of March, 1901, and at that date defendants were to pay plaintiff J. T. Nelson an additional sum of $4,500.00, or in lieu thereof to turn back to said Nelson all the property delivered by him, copy of which written contract is attached to plaintiff's petition and marked "Exhibit A," and made a part thereof.

Defendants further state that upon investigation of the rights, titles and interest of said companies as to the validity of the several coal leases made by said companies with the Creek nation in the Indian Territory, they were all void and invalid, except the coal lease made by the Tulsa Coal and Mining Companies, and as to the Tulsa Coal and Mining Co., instead of it having a lease upon 1,000,000 acres of coal land, as represented by plaintiff, same was good only for 940 acres.

Defendants further state that said shares of stock, records and seals of said companies were delivered to the defendants by plaintiff J. T.

Nelson at the Guthrie national bank in the city of Guthrie and Territory of Oklahoma, the place where said contract was made.

Defendants further state that prior to the 4th day of March, 1901, they notified the plaintiff, J. T. Nelson, that they did not desire to make payment of the $4,500.00 balance due on said contract, but in keeping with the contract and agreement they were willing and ready to turn him back said property as they did not wish to invest and pay out the additional sum of $4,500.

30 Defendants further state that prior to the beginning of this suit, viz: April 6th, 1901, they had notified the plaintiff that said shares and property were at the Guthrie national bank in the city of Guthrie and Territory of Oklahoma, subject to his order. They further state that there might be no mistake on the part of the plaintiff, the defendants expressed all of said shares of stock, to plaintiff J. T. Nelson at Fort Smith, Arkansas, the last post office address of plaintiff, and on said day they wired plaintiff that they had so expressed him said stock, which date was five or six days prior to the institution of this suit.

Defendants deny that it is true that they have converted to their use any of said shares of stock, records, seals or other property of said companies whatsoever; that they have tendered and do now tender to plaintiff J. T. Nelson each and all of said shares, records, seals and other property set out in said contract, and in response thereto the plaintiff wrote a letter declining to accept the express package, neither calling at the express office in Fort Smith Arkansas, or investigating same, but ignored the notice given to him by these defendants and the express company to call and get same.

Defendants further state that at the date, namely, the 28th day of May, 1900, said written contract was entered into by parties thereto, as set out in "Exhibit A" in plaintiff's petition, plaintiff falsely and knowingly represented that the daily output of said Tulsa coal mine was twenty car-loads of coal per day, and had been during the preceeding winter and fall; that he had personal knowledge to that effect and knew it was true; that he, being the secretary and large stockholder in said companies, he was closely advised and knew full well his representations to be true.

31 Defendants state that they had no personal knowledge of the daily output of said Tulsa mine, but relied upon the representations and statements made by plaintiff, J. T. Nelson, plaintiff, as to the earnings of said Tulsa mine and thereby were induced to pay over said $500.00 option and earnest money to the plaintiff, J. T. Nelson, and enter into said written contract with him.

Defendants further state that at the time said contract was entered into between the parties thereto, the plaintiff, J. T. Nelson, represented and stated that not only the Tulsa Coal and Mining Company had taken out coal and conformed to the requirements of the law and the requirements of said lease to hold same good and valid, but this was true with the leases of each and all the other coal and

mining companies, which is named and set out in said contract as a part of the consideration of same.

Defendants further state the truth to be that at the date of said contract, viz: May 28th, 1900, all of said leases had forfeited, except the Tulsa lease, for failure to perform work required of said companies by annually operating each of said mines set out and stipulated in the respective leases thereof; and defendants further state that, instead of the daily output of the Tulsa mine on the 28th day of May, 1900, and during the preceeding winter and fall, same was only from two to three cars per day. Defendants state by reason of said false representations made by the plaintiff at the time of said contract and relied on by the defendants, they entered into said contract and thereby they have been swindled out of the $500.00 option money advanced to plaintiff as set out in said contract.

Wherefore, they pray judgment for the sum of $500.00 so
32 advanced, all cost in this suit expended, and for each and every proper relief that defendants are entitled to.

JOHN D. DE BOIS,
COTTERAL AND HORNOR, For Def.

Endorsed: 3236. J. T. Nelson, plaintiff, *vs.* U. C. Guss, W. H. Gray, J. W. McNeal and F. H. Greer, defendants. Answer. Filed Nov. 27 1901. Thos. A. Neal, clerk district court.

33 Thereafter and on the 7th day of December, 1901, the plaintiff herein filed his reply to the answer of the defendants herein, which said reply is in words and figures following, to-wit:

34 TERRITORY OF OKLAHOMA, } *ss:*
County of Logan, }

In the District Court.

J. T. NELSON, Plaintiff,
vs.
U. C. GUSS, W. H. GRAY, J. W. MCNEAL, and F. H. GREER, Defendants. } Reply.

Now comes the plaintiff above named, J. T. Nelson, and for reply to the answer of defendants filed herein, denies each and every allegation in said answer contained except such as admit the allegations contained in plaintiff's petition.

W. R. BIDDLE,
GEO. S. GREEN,
SELWYN DOUGLAS,
Attorneys for Plaintiff.

Endorsed: No. 3236. J. T. Nelson, pl'ff. *vs.* U. C. Guss *et al.* Reply. Filed Dec. 7 1901. Thos. A. Neal, clerk district court.

35 Thereafter and on the 10th day of December, 1901, the defendants herein filed their amended answer to the petition, which said amended answer, with the endorsements thereon, is in the words and figures following, to-wit:

36 In the District Court of Logan County, Oklahoma Territory.

J. T. NELSON, Plaintiff,
vs.
U. C. GUSS, W. H. GRAY, J. W. MCNEAL, and F. H. Greer, Defendants. } Amended Answer.

Come now the said defendants, and for an amended answer to the petition of the plaintiff filed herein,

First. Said defendants deny each and every allegation contained in plaintiff's petition.

Second. For a further answer defendants admit that on the 28th day of May, 1900, the plaintiff was in possession of certain shares of stock and of certain records, seals and other property, belonging to certain coal companies in the Creek Nation, mentioned in plaintiff's petition, and that on the 28th day of May, 1900, said parties entered into a certain contract, a memorandum of which is attached to plaintiff's petition, and defendants admit that under said contract the plaintiff turned over and delivered to them, certain shares of stocks, books and other property mentioned in said memorandum of agreement in consideration of which, the defendants paid to plaintiff the sum of five hundred dollars, ($500.00) and agreed on or before March 4th, 1901, to pay to plaintiff the further sum of forty-five hundred dollars ($4,500.00) or in lieu thereof, to turn back to plaintiff all the property delivered by him to defendants as aforesaid.

The defendants allege that said memorandum of agreement, a copy of which is attached to the petition, was not, in fact, intended to represent the full and complete contract between said parties, but was merely intended as, upon its face, it purports to be, a memorandum indicating in a general way the nature of said contract.

37 Defendants aver that said shares of stock and other property mentioned in the petition, were delivered to defendants at the Guthrie national bank, in the city of Guthrie, and defendants aver that prior to the 4th day of March, 1901, they duly notified the plaintiff that they did not desire to make payment of the forty-five hundred dollars ($4,500.00) balance due on said contract at their option, but on the contrary desired to turn back to plaintiff all of said stock and other property mentioned in the petition, and defendants, at said time, duly notified the plaintiff that said certificates of stock and other property were at the Guthrie national bank in the city of Guthrie, the place where said property was delivered and where it was to be delivered and that defendants were ready and willing to deliver and turn back said property to

plaintiff and that defendants duly tendered all of said property back to plaintiff at said place of delivery, prior to March 4th, 1901, under and by virtue of the terms of said agreement.

Defendants further aver that on April 1*th*, 1901, the plaintiff, not having appeared to receive said property, nor sent any other person to receive it, and defendants not wishing to be chargeable with said property, expressed all of said shares of stock to the plaintiff, at Ft. Smith, Arkansas, the last known post office address of plaintiff and at such time wired plaintiff that they had expressed said stock to him and also wrote said plaintiff inquiring as to what disposition they should make of the books, seals and other property turned over to them by plaintiff.

38 But defendants aver that plaintiff wrongfully refused to take said shares of stock out of the express office or to notify defendants of what disposition they should make of the books, seals, etc. And defendants aver that they duly and legally tendered back to plaintiff all of said property, prior to March 4th, 1901, and have at all times been ready and willing to turn said property back to plaintiff and are now ready and willing to do so and do now tender to plaintiff all of said property.

Third. For a further answer, defendants aver that plaintiff and defendants entered into a certain contract, a written memorandum of which is attached to plaintiff's petition as "Exhibit A," by the terms of which defendants, in consideration of the payment of five hundred dollars ($500.00) were given the option to purchase certain shares of stock in certain coal companies upon lands lying and being in the Creek Nation, Indian Territory. Defendants aver that, for the purpose of inducing them to enter into said contract, the plaintiff wrongfully and unlawfully, falsely, wilfully and fraudulently represented to defendants that the coal companies mentioned in said memorandum of agreement had, held, and owned good, valid, and subsisting leases upon eleven hundred and twenty thousand (1,120,000) acres of coal lands lying and being in the Creek Nation in the Indian Territory, each of said companies having a lease upon one hundred thousand (100,000) acres excepting the —— company, which held a lease upon one hundred and twenty thousand (120,000) acres; that, for the purpose of inducing defendants to enter into said contract, plaintiff represented that all of said leases were in full force and effect and that said coal companies had complied with all the requirements of law, both of the Creek and Muskogee Nation

39 and of the Federal statutes in such cases made and provided and had also complied with all the provisions and requirements made and proscribed by authority of law by the Secretary of the Interior and Commissioner of Indian Affairs of the United States, and that they had done work and made improvements upon all the lands covered by said leases and further that said companies had prospected for and discovered coal upon all the lands covered by said leases.

Defendants aver that for said purpose, to-wit: of inducing defend-

ants to enter into said contract and as a further inducement, therefor, the plaintiff represented to defendants that a mine known as the Tulsa mine, upon said land covered by the alleged lease of said Tulsa Coal Company, was at said time, producing twenty (20) carloads of coal per day and that said mine had been producing twenty (20) carloads of coal per day during the preceding winter and fall. But defendants aver that said representations of the plaintiff, with reference to the validity and existence of said leases and of the daily output of the said Tulsa mine, were false, and were known by plaintiff to be false at the time when he made them, and were made with the willful purpose and intent on the part of the plaintiff to induce and influence defendants to enter into said contract and to cheat and defraud defendants.

That defendant had no knowledge that said representations were false and believed and relied upon said representations and that believing said representations to be true and relying thereon, they were thereby induced to and did enter into said contract with the plaintiff and paid the plaintiff the sum of five hundred dollars ($500.00) for the purpose of acquiring an option to purchase the stock in said mining companies.

Defendants aver that as a matter of fact, said companies
40 did not have valid and subsisting leases upon any coal lands in the Creek reservation, save and except nine hundred and forty (940) acres, covered by a lease of the Tulsa Mining Company, and defendants aver that if said companies ever had leases upon other tracts of land in said Creek reservation as hereinbefore alleged, that all of said leases had, prior to the making of said contract, lapsed and become forfeited by reason of the failure of said coal companies to comply with the terms of said leases and the statutes and laws in such cases made and provided and the regulations of the Secretary of the Interior and Commissioner of Indian Affairs of the United States and defendants aver that at the time of the making of said contract said coal companies had no leases upon said lands, and that instead of having valid and subsisting leases upon eleven hundred and twenty thousand (1,120,000) acres in said Creek reservation, as aforesaid, said companies had no leases whatever upon said lands save and except the said Tulsa Coal Company and said company, instead of having a lease upon one hundred thousand (100,000) acres of land in said reservation as represented by the plaintiff, only had a lease upon nine hundred and forty (940) acres and defendants aver that the said Tulsa coal mine, instead of turning out twenty cars of coal a day was only turning out about two (2) cars of coal a day which was the total output of said mine, all of which facts were well known to plaintiff at the time when he made the said false and fraudulent representations; that defendants would not have entered into said contract at all if they had not believed and relied upon the said representations of plaintiff.

That on account of the fact that such leases had been forfeited

prior to and at the time when said contract was entered into,
41 the stock and other property of said coal companies mentioned in the petition, excepting the Tulsa Coal Company was of no value whatever either to the plaintiffs or to the defendants, and that the stock and books of said Tulsa Coal Company were only of a nominal value, and that by reason of the said false and fraudulent representations of the said plaintiff by which they were induced to enter into said contract as aforesaid, defendants were and are, damaged in the sum of ten thousand dollars ($10,000).

Wherefore, defendants demand judgment that the plaintiff take nothing by this action and that defendants have and recover of and from the plaintiff, damages in the sum of ten thousand dollars, ($10,000.00) and for costs of suit and all other proper relief.

JOHN D. DE BOIS &
COTTERAL AND HORNOR,
Attorneys for Defendants.

Endorsed: 3236, J. T. Nelson *v.* U. C. Guss, *et al.* Amended answer. Filed Dec. 10, 1901. Thos. A. Neal, clerk district court. John D. De Bois & Cotteral and Hornor.

42 Thereafter and on the 3rd day of January, 1902, the plaintiff herein filed his reply to the amended answer of the defendants, which said reply, together with the endorsements thereon, is in the following words and figures, to-wit:

43 In the District Court of Logan County, Oklahoma Territory.

J. T. NELSON, Plaintiff,
vs.
U. C. GUSS, W. H. GRAY, J. W. McNeal, and F. H. Greer, Defendants. } Reply to Amended Answer.

Now comes said plaintiff by his attorneys and for his reply to the amended answer filed herein denies each and every allegation contained in said amended answer except such allegations as are consistent with the allegations of the petition herein.

2nd. This plaintiff specifically denies that said defendants ever notified this plaintiff that they desired to return the property mentioned in the contract attached to the petition previous to the 4th day of March, 1901.

3rd. Said plaintiff further specifically denies that said defendants ever at any time offered to return said property or did return said property as provided for by the contract attached to the petition.

4th. This plaintiff further alleges that said defendants previous to the execution of the contract described in the petition, came to the office of the coal companies mentioned in the petition, at Fort Scott, Kansas and examined all of the records with reference to each

of said coal companies together with all of the minutes of the actions of the directors and officers of said coal companies. They also examined the opinions of attorneys who had been employed by said coal companies to give their written opinions upon the legality of said leases and the said coal companies. They also went to the Creek Nation and examined the lands and talked with Col. Brown, who was in charge of the coal company in said nation. They
44 also knew, by personal observation and investigation and by conversing with Col. Brown, all about the output from said coal mines and they relied solely and alone upon their own investigation and the information they thus obtained, at the time they executed the contract described in the petition.

Plaintiff further alleges that at the time of the execution of said contract, these defendants were the owners of stock in said coal companies and that this plaintiff never, in any way, mislead or attempted to mislead the said defendants with reference to said property, said leases or said companies.

5th. Plaintiff further avers that said defendants have received royalties from said mines on the stock mentioned in the petition during all of the times since the same were delivered to them, both before and after the 4th day of March, 1901, and that they have always treated said property as their own; they have elected themselves directors and officers of said company to manage and control the same and have excluded at all times this plaintiff from participating in any way in the control or management of said mines or from any royalty therefrom and that they have never at any time tendered all of the property mentioned in said contract to this plaintiff. But plaintiff avers that after the 4th day of March, 1901, said defendants went to Washington for the purpose of determining whether they would retain said property or return it to this plaintiff and made complete and thorough investigation with reference to said properties, said stock and said companies, and failed during all of said investigation, after the 4th day of March, 1901, to tender said property back or put this plaintiff in the position he was prior to the execution of said contract.

45 This plaintiff further says that prior to the execution of said contract he controlled a majority of the stock in said companies; that the board of directors were friendly to him; that he was just about to develop and open up more mines under the leases of said companies; that he was seeking to obtain permits from the Indian agent for more property, but that relying upon said contract and time being of the essence thereof he, after the 4th day of March, 1901, not having heard from said defendants, and relying upon said contract paid no further attention thereto and sought other employment.

Wherefore, plaintiff demands judgment as in his petition stated.

W. R. BIDDLE,
GEO. S. GREEN, AND
SELWYN DOUGLAS,
Attorneys for Plaintiff.

Endorsed: No. 3236. J. T. Nelson, pl'ff, *vs.* U. C. Guss, *et al.*, def'ts. Pl'ff's reply to amended answer. Filed Jan. 3, 1902. Thos. A. Neal, clerk district court.

46 Thereafter and on the 19th day of February, 1903, said cause came regularly on for trial, and both parties announce ready for trial; thereupon a jury is waived by both plaintiff and defendants, and said cause is tried to the court, the plaintiff appearing by W. R. Biddle, Geo. S. Green and Selwyn Douglas, and the defendants appearing by John D. De Bois and Cotteral and Hornor. Thereupon the following proceedings were had, evidence introduced, objections made, rulings of the court and exceptions saved as shown by the transcript of Thomas A. Higgins, court reporter of said district court, as hereinafter shown, to-wit:

47 In the District Court of Logan County, Oklahoma Territory.

J. T. NELSON, Plaintiff,
vs.
U. C. GUSS, W. H. GRAY, J. W. MCNEAL, and F. H. Greer, Defendants. } Transcript.

Tried February 19, 1903, at the February 1903 term of the above entitled court, before Hon. John H. Burford, judge, without the intervention of a jury.

Appearances: For the plaintiff, W. R. Biddle, Geo. S. Green, Selwyn Douglas. For the defendants, John D. De Bois, Cotteral & Hornor.

By the COURT: I believe under the pleadings, the burden is on the defendants.

By Mr. GREEN: I believe, if the court please, before proceeding, we will ask for judgment on the pleadings in this case.

Which motion was by the court overruled, to which the plaintiff excepted.

Thereupon J. W. MCNEAL was called as a witness in his own behalf, and being duly sworn, testified as follows:

Direct examination by Mr. DE BOIS:

Q. Your name is J. W. McNeal?
A. Yes sir.
Q. You are one of the parties defendant in this suit, are you?
A. Yes sir.

48 Q. Mr. McNeal, you were present at the time this trade was made with Mr. Nelson, by which you bought the stock which the suit now alleges to have been bought under the contract?
A. Yes sir.

Q. Now, Mr. McNeal, I will ask you, at the time that you bought this stock from Mr. Nelson, did you and Mr. Guss and the others hold any shares in these companies?

A. Yes sir, we had sold under the provisions for selling collaterals on a note, about $250,000, which was one fourth of the stock in each of the ten companies.

Q. You bought that at the foreclosure, which you held as collateral?

A. Yes sir.

Q. At the time you bought them, did you know anything about them as to the value or output of the mines?

Objected to as incompetent, irrelevant and immaterial, which objection was by the court sustained, to which the defendants excepted.

By Mr. HORNOR: There is an allegation here in the reply that we have been doing certain things; now, we owned some of this stock before this contract was entered into, some stock which had been put up by Mr. Nelson, I understand it, as collateral for a loan, is that correct, Mr. McNeal?

A. By Messrs. Brown and Parker.

By Mr. HORNOR: And that had been put up with Mr. McNeal as collateral to a note and that stock was put up and sold, was simply bought in in the routine of the bank, and I wish at any rate for the court to understand that that was a part of our statement, that we would show the extent of the connection of any of these parties with this company, prior to the time the contract was made, and
49 that we held 25 % of the stock. They are contending that we knew about this, were stockholders there and elected ourselves officers of the company and everything, and it might possibly have some bearing——

By the COURT: Possibly under that view of it it may be well to inquire into it and their relations to it.

By Mr. GREEN: We except.

Q. Previous question read by stenographer.

A. Nothing except the representations made to us by Nelson, Brown and Parker.

Q. At the time this purchase was made, were you an officer of those companies?

Objected to as incompetent, which objection was by the court overruled, to which the plaintiff excepted.

A. No sir.

Q. At the time?

A. At the time of the sale of the collateral?

Q. Yes sir.

A. No sir, I wasn't an officer of the coal company, is that what you mean. If I understand your question, that is the way I ought to answer it.

Q. Isn't it a fact that you had been notified before that that the company had elected you treasurer of the company?

A. No, I don't so remember it. At the time of the sale of the collateral?

Q. At the time that you made the deal with Mr. Nelson for the purchase of the stock set out in the contract now under litigation, were you an officer of the several coal companies?

A. I think so.

Q. What position did you hold?

A. Treasurer.

50 Q. Were you present at the election at the time you were elected?

A. No sir.

Q. Had you ever been present at any meeting of the companies?

A. No sir.

Q. At that date had you received any money from the several coal companies, as treasurer?

A. No sir.

Q. Now then, you will state what representations Mr. Nelson made as to these coal companies and their output at the time you made the purchase from him?

Objected to as incompetent, irrelevant and immaterial and assuming, tending to vary the terms of a written contract——

By Mr. De Bois: We allege he did and we allege they were fraudulent and falsely made.

By the Court: The objection goes to the form of the question, you haven't yet asked him if he made any representations at all to him.

By Mr. De Bois: At the time you made the purchase of this stock of Mr. Nelson, did Mr. Nelson make any representations as to the output of those mines?

Objected to as incompetent, irrelevant and immaterial, leading and suggestive, which objection was by the court overruled, to which the plaintiff excepted.

A. He did.

Q. State what those representations were.

A. He represented that they were taking out twenty car loads a day.

Objected to as being a conclusion——

By the Court: The witness will be confined to the conversation,—what was said.

51 A. He stated that they were taking out 20 car loads a day out of the Tulsa mine, situated near Dawson.

By Mr. De Bois: What did he say as to the other mines?

A. He said that the leases were all in force and the royalty paid in advance; he held a receipt from the treasurer of the Creek Nation,

and that work had been performed on the other leases and exhibited a map to show the places where work had been performed.

Q. Now then, I will ask you, how much is a car load of coal?

A. Cars vary from 20 to 30 and 40 tons usually—30 would be an average of cars shipped out.

Q. What royalty would this Tulsa Coal Company get per ton under the contract with this company, if any?

Objected to as incompetent, irrelevant and immaterial and the contract being the best evidence, and further to the competency of the witness, which objection was by the court sustained for the present, to which the defendants excepted.

Q. What was the status of the Tulsa Coal Company at the time this deal was made, Mr. McNeal?

Objected to as incompetent, irrelevant and immaterial, and if there are any contracts, they are the best evidence. Which objection was by the court overruled, to which the plaintiff excepted.

A. My information, as derived later——

Objected to——

By the COURT: The question goes to his information now, as to what the status was then; if he knows what it was, he might state it.

A. Yes sir, we were depending on the representations made by Mr. Nelson.

52 Objected to, move to strike out the statement of the witness, for the reason that it is not responsive to the question, motion and objection was by the court sustained, to which the defendants excepted.

By Mr. HORNOR: Tell what it was, Mr. McNeal.

A. I have got to come down a little further——

By the COURT: I stated a while ago that his question calls for your answer as of this time, what you know now what it was then.

A. I found out later that——

Objected to as hearsay, which objection was by the court overruled, to which the plaintiff excepted.

A. I found out later it was producing about two car loads a day.

Objected to, move to strike out as hearsay,—no ruling.

By Mr. DE BOIS: Who was operating it, Mr. McNeal?

A. Mr. Ed Brown. My information however, came from the office of the Kansas and Texas Coal Company, their transcript of what coal was taken out.

Objected to—sustained,—exception.

Q. I will ask you did you receive any royalties on your interest in this coal as treasurer of the company?

A. I did.

Q. From whom did you receive that royalty?
A. The Kansas and Texas Coal Company.
Q. What interest did the Kansas and Texas Coal Company have in it?

Objected to as incompetent, irrelevant and immaterial and the written contract is the best evidence, which objection was by the court overruled, to which the plaintiff excepted.

A. They have a lease.

Q. Examine this and say whether or not this is the lease?
53 A. Yes sir.
Q. Who furnished you this lease, Mr. McNeal?
A. Mr. Nelson.

Here the same is marked "Exhibit A" for the purpose of identification, and offered in evidence by the defendants.

By Mr. BIDDLE: We have no objection to the lease except on the general principle that it is not competent. Which objection was by the court overruled.

"Exhibit A" is as follows:—

Whereas, the Tulsa Coal and Mining Company, a corporation duly organized under the laws of the Creek Nation, Indian Territory, controls by lease from the Creek Nation a triangular tract of coal lands containing one hundred and twenty thousand (120,000) acres, which lands lie east of the Arkansas river in said nation and desires to make a lease thereof for a period of five years, with the privilege of renewal for a like period of time; and,

Whereas, the Kansas and Texas Coal Company is willing to make such a lease upon a royalty basis provided a renewal thereof can be obtained for a like period and upon like terms,

Now, therefore, this agreement made by and between the Tulsa Mining Company, party of the first part, and the Kansas & Texas Coal Company, party of the second part, for and in consideration of the premises and of the mutual promises, covenants and agreements of the parties and of the royalty to be paid and received and of the sum of five dollars ($5.00) by each of the parties to the other paid, the receipts whereof is acknowledged, the parties have agreed to and with each other in the manner following, that is to say:

First. The party of the first part has leased, demised and let for a period of five (5) years next ensuing from and after the —
54 day of June, 1898, the lands above described and covenants and agrees to renew this lease and contract at the end of said time for a like period of five (5) years upon the same terms and conditions, as hereinafter stated.

Second. The party of the second part agrees to pay a royalty of ten (10) cents per ton for all coal taken out under this lease and contract, which shall be lump coal and well cleaned and merchantable, free from slate, sulphur and all foreign matter of every kind or character.

Third. It is understood and agreed between the parties that the party of the second part shall not be required to pay any royalty under this lease and contract except when it may be able to find a market for the coal to be taken out and then only when a sale thereof can be as profitably made as are all other sales made by the party of the second part of coals which it is now or may hereafter be mining, or in which it is now, or may hereafter be interested.

Fourth. It is understood and agreed that all tracks, buildings and improvements erected by the party of the second part shall remain its property and be removable at its pleasure. It is also understood and agreed that the party of the second part shall have and is hereby given the same rights and privileges in and upon the lands above described as are now possessed by the party of the first part.

In witness whereof, the parties hereto have caused these presents to be signed by their proper officers, thereunto duly authorized, and their corporate seals to be hereto affixed and attested by their respective secretaries.

THE TULSA COAL & MINING COMPANY,
By E. H. BROWN, Pres't.
KANSAS & TEXAS COAL CO.,
By B. F. HOBART, Pres't.

Attest: —— —— Secretary.
Attest: W. B. MASS, Secretary.

55 Q. By what authority did the Kansas and Texas Coal Company pay you a royalty on the output of the Tulsa lease?

Objected to as incompetent, irrelevant and immaterial, calling for a conclusion, which objection was by the court overruled, to which the plaintiff excepted.

A. By virtue of that contract, and sent to me as treasurer of the company.

Q. How much per ton did they pay you, Mr. McNeal?

A. They paid me a cent and a half per ton. They held out one-half cent to send to Emmett Brown who held 25 % of the stock; their statement showed they were paying two cents per ton royalty, but I only received a cent and a half.

Q. They held back one fourth of it?

A. One fourth of it which Mr. Emmett Brown, who held one fourth of the stock, received.

Q. How much did you receive as treasurer from the Kansas and Texas Company as royalty, all told?

A. $879.40.

By Mr. GREEN: As I understand that was three fourths of the royalty?

A. Three fourths come to us.

Q. The other quarter went to Brown?

A. It was withheld, it never come to me.

By Mr. DE BOIS: How much of that was received prior to the 4th day of March, 1901?

A. There was right at $500.

Q. What period of time had been consumed by the coal company in producing this $500.00?

Objected to as incompetent, irrelevant and immaterial, which objection was by the court overruled, to which the plaintiff excepted.

56 *A. It was substantially nine months.*

Q. Isn't it a fact that some of these royalties that you received was for the output of the mines that were due before taking it, prior to taking out this contract?

A. I don't think so.

Objected to as calling for a conclusion, which objection was by the court sustained.

By Mr. HORNOR: Since the 4th day of March, how has that royalty been kept?

A. Two thirds of it has been kept in the name of J. T. Nelson, and one third has been kept for the company.

By Mr. DE BOIS: Now I will ask you, Mr. McNeal, what did you do toward operating or developing the other nine coal mines?

A. Nothing towards operating them?

Q. Did you make any effort to arrange to open them?

A. Yes sir.

Q. What did you do?

Objected to as incompetent, irrelevant and immaterial, and not tending to prove any issue in this case, which objection was by the court overruled.

A. In company with Mr. Guss and Mr. De Bois we went to Muscogee and saw Mr. Wright, who was in charge of Indian affairs there, and represented to him——

Objected to as not responsive, which objection was by the court sustained, to which the defendants excepted.

Q. I will ask you what did you do toward operating the other nine mines?

A. Made application to the Indian agent for authority to operate them.

Objected to as incompetent, which objection was by the
57 court overruled.

A. (con.). And he told us——

Objected to as hearsay—which objection was by the court overruled, to which the plaintiff excepted.

A. (con.). —that the leases had no validity and that we would be arrested if we undertook to work any of them.

Q. When you say Indian agent, do you mean the United States——
A. I mean George A. Wright——
Q. The United States——
A. Indian commissioner, I think, I am not sure.
Q. Now at that time had any other of those mines been operated did you find them to be?
A. We found they hadn't been.
Q. Do you remember the date that you went to Muscogee with Mr. Guss and myself?
A. Not certainly, I would say though I think it was either in November or December of 1900.
Q. Now, Mr. McNeal, you set up damages here, ten thousand dollars damages by reason of the failure of these mines, not being in operation and by the shortage of the Tulsa mine, the output being from twenty to two car loads a day, state to the court wherein you are damaged by reason of that.

Objected to as incompetent, which objection was by the court sustained to which the defendants excepted.

A. Assuming thirty tons to be an average car load of coal at a cent and a half of five cents royalty would be $30.00 and three fourths of that would have been $22.50 a day income. At two cents royalty it would have been $96 a day, whereas only getting two cars, it amounted to ninety cents a day or something like that; it made that much difference in a period of time, it would have made our income then at two cents at three or four thousand dollars and at five
58 cents would have made it more than twice as much.
Q. State all that Mr. Nelson said at the time that you made this deal, at the time you made this lease or prior thereto?

Objected to as incompetent irrelevant and immaterial, which objection was by the court overruled, to which the plaintiff excepted.

A. Mr. Nelson came here and we had a meeting of the parties who purchased it with Mr. Nelson at the Guthrie national bank. He said that Brown was taking out this amount of coal, but he couldn't get him to settle with him; that he was satisfied that if we got it we could make him make a settlement, and said that the mines were putting out twenty car loads a day, and exhibited that contract with the M. K. & T. Company, which of course made it a very flattering proposition. We paid him and made the contract with him; he also said there would be no trouble in getting the secretary to ratify those leases, and that perhaps we could get a special bill through Congress ratifying them. That is the reason the 4th day of March was set as the day, when Congress would adjourn at that time.

By Mr. HORNOR: What did he say about the leases, as to having paid royalty, their validity and being in force and effect if anything?

Objected to as leading——

A. He said that the leases were all valid and that the royalties had been paid in advance, and exhibited a letter from Judge Biddle of Fort Scott which said that they were valid and also one from J. F. Richards, of Ft. Scott, that in their opinion they were valid and we would have vested rights under them, and on the strength of these representations we made the deal.

By Mr. De Bois: At the time you made this contract with Mr. Nelson, did you know that these representations—did you
59 know whether they were correct or not, from your own knowledge?

A. Not from my own knowledge, I supposed they were correct.

Q. Now, I will ask you did you at any time afterwards go in person to the Tulsa mine?

A. I did.

Q. Well now, did you ascertain, while there, in person, about the daily outputs of their mine?

A. I got a statement from Brown who was managing it.

Q. About how much were they putting out?

A. They were averaging—the general average was two car loads a day. December and January it was some stronger.

Q. Were they mining at the time you were there?

A. Yes sir.

Q. Do you remember about how many cars a day there — at that time,—loading a day?

A. Three or four cars in the process of loading, they were loading with wagons.

Q. Now Mr. McNeal, did you notify Mr. Nelson before the 4th of March that you would not keep the stock, and that you would return it to him?

Objected to as leading and suggestive——

Q. What did you do, if anything, toward notifying Mr. Nelson as to whether you would keep the stock or return him the stock?

A. I wrote him——

Objected to as not the best evidence, which objection was by the court sustained.

Q. State what you did, if anything was said or done, toward advising Mr. Nelson as to what you would do in regard to the contract?

By the Court: He said he wrote him.

By Mr. De Bois: Have you a copy of that letter?

60 A. No, I didn't seem to be able to find it; the letter is here.

Q. I will ask you if you gentlemen together had an understanding as to whether you would carry out the contract and pay Mr. Nelson the $4500. or return him the stuff.

Objected to as calling for a conclusion, which objection was by the court sustained.

Q. Did you return Mr. Nelson the stock?
A. Yes sir, I returned him the stock.
Q. Did he receive it?
A. He refused to take it.
Q. Where is that stock now?
A. Down at the Guthrie national bank.
Q. Have you notified Mr. Nelson as to where the stock was since?
A. Not since.
By Mr. HORNOR: Where was this contract made, Mr. McNeal?
A. It was made at the Guthrie national bank.
Q. Where was the stuff turned over to you?
A. At the Guthrie national bank.
Q. Where was it kept?
A. It was kept at the Guthrie national bank.
Q. Do you know whether Mr. Nelson resided in this Territory or not?
A. I don't think he did, I didn't so understand it.
Q. Where did you understand he resided?
A. At Fort Scott, I think was his home, Kansas.
Q. At the time this contract was made?
A. Yes, sir.
Q. Did you understand where he was residing on the 4th day of March?
A. Well, I understood he was at Fort Smith Arkansas.
Q. You don't know whether he lived there or not?
61 A. I understood he was, I don't know whether he was living there or not.
Q. What was turned over to you under this contract?
A. Fifty per cent. of the stock in each one of these coal companies, and the minute books and the stock books and seals of the different companies.
Q. And these charters?
A. Yes sir.
Q. You may state whether or not there was ever any leases turned over to you?
A. Not except the lease of the Missouri and Kansas Coal Company, unless those charters should be regarded as leases, I don't know.
Q. Unless these charters would be regarded as leases, there was no leases to these companies ever turned over to you?
A. No sir.
Q. Did you ever see any?
A. Never did, except as I mentioned.
Q. Do you know of your own knowledge whether there were any?
A. I do not. I want to say I supposed the Guthrie national bank was the place where the stock was to be turned back——

Objected to and move to strike out the answer as not responsive.
WITNESS: I am testifying to the truth and the whole truth, I don't care whether the question is asked or not——

By Mr. GREEN: I want to make a record, if the court please.
By the COURT: What was your motion?
By Mr. GREEN: I move to strike out the statement of the witness because it is not responsive to the question.
By the COURT: The motion will be sustained.
62 WITNESS: Do I understand the court to prohibit me from making a statement, except when a question is asked?
By the COURT: No sir, unless it is not competent to make the statement. What one supposes is not competent evidence.

A. (con.) The contract itself does not state where the delivery is to be made, and I suppose there would be some place stated.

By Mr. HORNOR: We have here a lot of so-called charters, I believe we will offer these in evidence.
By Mr. BIDDLE: There is no question raised on them.
By Mr. HORNOR: No, there is no question, but I would like to have the court kind of glance over one of them.
By Mr. DE BOIS: Now here is another matter, here is these records, I don't know, this is a copy of one of them.
WITNESS: There is a half a dozen more, they are all just the same.
By Mr. BIDDLE: And I suppose they could all be considered in evidence and we can refer to them in the arguments.
By Mr. DE BOIS: Just state Mr. Jtenographer that the records of all the companies are considered to be in evidence.

Q. Mr. McNeal, I will ask you if you received that letter that you have there from Mr. Nelson?
A. Yes sir.

Here the same is offered in evidence, marked "Exhibit B" and there being no objection to the same it is as follows:

Geo. Tilles, President. H. B. Meister, Manager.

Hotel Tilles. A Modern Hotel.

FORT SMITH, ARK., 2-25, 1901.

J. W. McNeal, Esq.

DEAR SIR: If you accept of agreement on or before March
63 4th, 1901, (date of expiration of option) please remit me here.
If not, kindly send stock by express and the books, seals etc. by freight.
Do not forget to enclose me resignation of the officers you have elected, as per agreement.
Yours truly, J. T. NELSON.

Q. Also examine this letter?
A. I sent this letter.
Q. You wrote that to Mr. Nelson?
A. Yes sir.

Here the same is offered in evidence, marked "Exhibit C" and there being no objection to the same it is as follows:

4348.

J. W. McNeal, President. A. J. Seay, V. Pres.
W. J. Horsfall, Cashier.

Guthrie National Bank.

Capital, $50,000; Surplus, $10,000.

GUTHRIE, OKLAHOMA, Feb. 27, 189–.

J. T. Nelson, Fort Smith, Ark.

DEAR SIR: Your letter of the 25 received. I start in the morning for Washington, and will not be here the fourth. Brown is president, De Bois, vice president, Guss, secretary, McNeal, treasurer. The only thing you would be entitled to have returned to you would be the stock. I may not be here to send it to you the fourth.

Yours respectfully, J. W. McNEAL.

64 Q. I will ask you if you also received that letter from Mr. Nelson?

A. This is Nelson's signature to each one of these documents.

Q. Did you receive that with the other papers and at the time?

A. No, this one I prepared and the other is not my handwriting. I am not so sure just when that was done; this I prepared at the time; where he made Mr. Guss his proxy; that one in my handwriting I have forgotten about; possibly I took it right then and there, the date seems to have been rubbed out.

Q. Then you did receive these papers signed by Mr. Nelson there?

A. That one was handed at the time, and now that one in my handwriting, I have really forgotten about, I can't fix it now, whether I done that at the time or later.

Here the same are marked Exhibits "D" and "E," and there being no objections, they are as follows:—

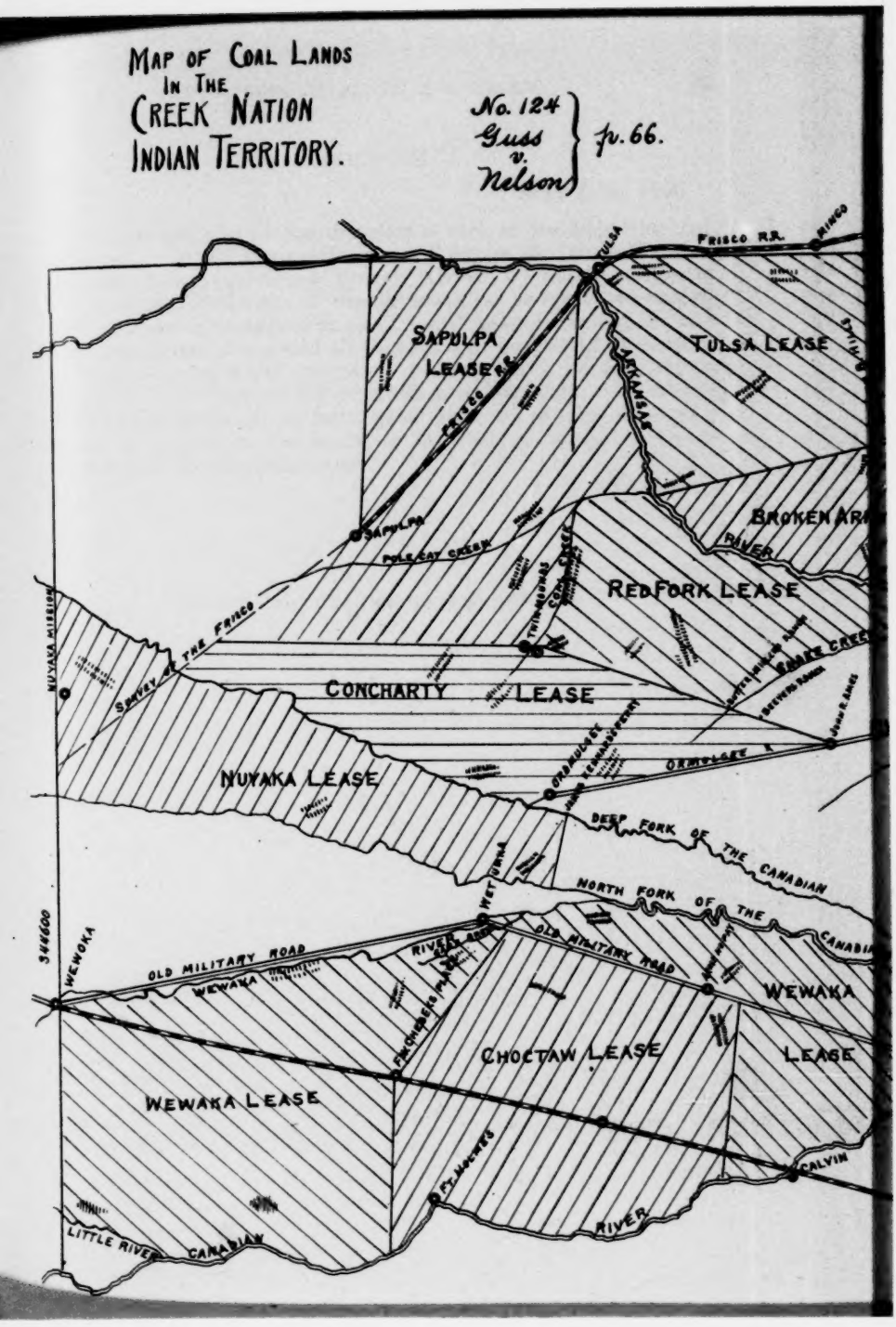
EXHIBIT "D."

GUTHRIE, O. T., ——, 190–.

I hereby tender my resignation as director in each of the following coal and mining companies, to-wit: Sapulpa, Choctaw, Catoosa, Wewaka, Red Fork Neyaka Concharty, Tulsa Gar Creek, and Broken Arrow.

Witness my hand:

J. T. NELSON.


MAP OF COAL LANDS
IN THE
CREEK NATION
INDIAN TERRITORY.
No. 124
Guss
v.
Nelson
fr. 66.
TULSA
FRISCO R.R.
SAPULPA LEASE
TULSA LEASE
ARKANSAS
SAPULPA
POLECAT CREEK
BROKEN ARROW
RIVER
REDFORK LEASE
CONCHARTY LEASE
NUYAKA LEASE
NUYAKA MISSION
SURVEY OF THE FRISCO
DEEP FORK OF THE CANADIAN
NORTH FORK OF THE CANADIAN
OLD MILITARY ROAD
WEWOKA
WEWOKA LEASE
CHOCTAW LEASE
LEASE
CALVIN
LITTLE RIVER
CANADIAN
RIVER

3446003

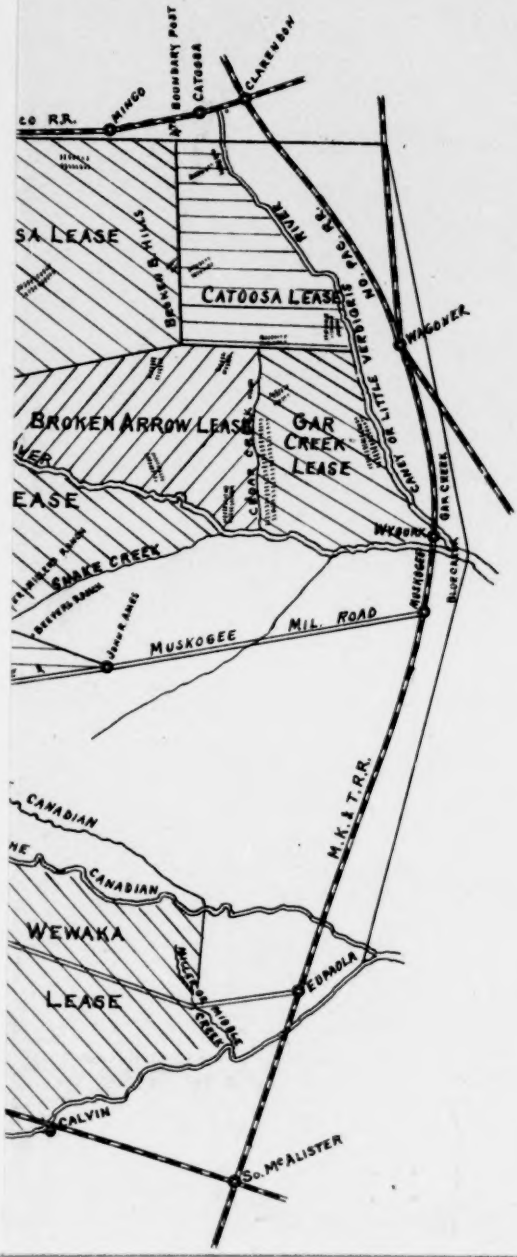

CO R.R.
MINGO
N.W. BOUNDARY POST CATOOSA
CLAREMORE
SA LEASE
CATOOSA LEASE
BROKEN ARROW LEASE
GAR CREEK LEASE
EASE
WAGONER
OAK CREEK
SNAKE CREEK
MUSKOGEE
MIL. ROAD
CANADIAN
M.K.&T.R.R.
WEWAKA
LEASE
EDMOND
CALVIN
So. McALISTER

EXHIBIT "E."

MAY 28TH, 1900.

I, J. T. Nelson one of the directors of each of the following coal and mining companies, viz:—Choctaw, Wewoka, Red Fork, Neyaka, Concharty, Tulsa, Gar Creek, Broken Arrow; do hereby authorize U. C. Guss of Guthrie, one of the stockholders in the above named companies, to appear at all of the directors' meetings in said companies at any and all times to act in my stead as director for all intents and purposes. I hereby ratify all the actions of the said U. C. Guss as my proxy at such meetings. The within and foregoing authority to hold good until my resignation as said director is accepted by the board of directors of the several aforesaid coal and mining companies.

J. T. NELSON.

(Here follows diagram marked page 66.)

67 Q. Now, Mr. McNeal I will ask you afterward was Mr. Nelson's resignation accepted as tendered there?

By Mr. GREEN: I suppose the records of the company would be the best evidence as to that, but I have no objection.

By Mr. DE BOIS: I don't know whether it was made a matter of record; as a matter of fact it was accepted.

Q. Was there any other party elected secretary in his stead?

A. Yes sir.

Q. Who was that party?

A. Mr. Guss.

Q. And who was the secretary of the company on the 4th day of March, 1901?

A. U. C. Guss.

Q. Now, Mr. McNeal at the time this contract was made with Mr. Nelson, as to his representation as to the output of the mine and him having been paid royalty, etc., did you rely on his statements?

Objected to as leading——

Q. Did you or did you not?

Which objection was by the court overruled, to which the plaintiff excepted.

A. I did.

Q. Now I will ask you if you would have made this contract if you hadn't believed the representations made by Mr. Nelson?

Objected to as incompetent, irrelevant and immaterial, which objection was by the court overruled, to which the plaintiff excepted.

A. I would not have made it had I not believed in his representations.

Q. Now then, if you had known the conditions existing as to the leases and the mines as they were, would you have made the contract at all?

68 Objected to as incompetent, irrelevant and immaterial, which objection was by the court overruled, to which the plaintiff excepted.

A. I don't think so; that is a different proposition from the one we accepted. Excepting on the basis——

Objected to as not responsive to the question——

By the COURT: You have answered the question Mr. McNeal.

By the WITNESS: I haven't answered it fully, but I don't understand when I take an oath to tell the whole truth that I am limited to some question that some attorney has.

By the COURT: When you are sworn to tell the truth, it means that you are sworn to tell about any facts; if, after you have answered the question you want to explain the fact, you may do so.

By the WITNESS: That is exactly what I am trying to do.

Q. What explanation did you desire to make, I will see whether it is proper to go in the record, or not.

A. I said I agreed to the contract solely on the representations he had made. What I might have done had I known the truth, I can't say now, that is what I wanted to say.

That may go in the record.

By Mr. HORNOR: Did Mr. Nelson or any body on his part ever appear here to receive this stuff back?

A. No sir.

Q. You may state whether su-sequent to the 4th of March you attempted to send any of this stuff to him.

Objected to as incompetent——

Q. All right, state what you did.

A. After my return from Washington, I in company with Mr. De Bois selected out the stock that had been turned over to us by Nelson and expressed it to him at Fort Smith.

69 Q. When was that?

A. That was April 1st.

Q. 1901?

A. 1901. And I want to say at the time I had no knowledge that there was any dissatisfaction on Mr. Nelson's part whatever, and I only sent it to him as a matter of courtesy. I didn't understand we had to send it to Fort Smith, under our contract.

Plaintiff moves to strike out the answer as immaterial which motion was by the court overruled, to which the plaintiff excepted.

Q. Is that Tulsa mine still in operation?

A. They aren't sending any royalty and haven't for two or three months, three months, I think.

Q. I believe you stated that from and after the 4th of March, that you seperated the royalty that was paid into your hands as treasurer and set apart to Mr. Nelson the portion represented by this stock?

Objected to as not the best evidence, which objection was by the court sustained.

Q. Is it on the books?

A. It is on the books of the Guthrie national bank, I never kept a separate treasurer's book. When a draft was received prior to the 4th of March, we credited it to the Tulsa Coal Mining Company. After that time we credited $\frac{1}{3}$ of the royalties received to the Tulsa Coal Mining Company, and $\frac{2}{3}$ to J. T. Nelson.

Cross-examination by Mr. BIDDLE:

Q. Then you never received any of that money as treasurer of the company?

A. Oh, yes, that royalty money?

Q. Yes.

70 A. It was sent to me as treasurer.

Q. If I understand you, they paid Mr. Brown his share of the royalty direct to him?

A. That is the way they represented to him, they paid him one half cent per ton.

Q. They were paying him that ½ simply because he owned ½ of the stock?

A. Well, that was the arrangement made by Ed Brown.

Q. Was the amounts paid to you ever distributed by the board of directors?

A. Yes sir.

Q. Did you make a record of it on the minutes of the board of directors? I don't see any on this book that is introduced here?

A. That is not my record.

Q. I mean, did the board of directors ever declare dividends there?

A. I did that, yes sir.

Q. Did the board of directors ever declare a dividend?

A. I don't think by any formal resolution they did, but as a matter of fact——

Q. Any notice on the record, if there is now, that the board of directors ever did, just show it, if they distributed the money in your hands or declared a dividend?

A. Well, the situation about that was that we never declared but one dividend that I know of.

Q. Is that any minutes on that record?

A. I didn't keep that book, I don't know, I could look if you want me to.

Q. Did you as director—you were a director, weren't you?

A. Yes sir.

71 Q. Did you as director ever meet with the board for the purpose of distributing that fund in your hands that you received as a royalty.

A. Well, De Bois and Guss and myself, was all.

Q. Did you meet as a board of directors?

A. Well, not formally, I don't think.

Q. Did you keep any record at all of your proceedings?

A. I don't know whether Mr. Guss did or not, I didn't; I wasn't secretary.

Q. Now while we are about this I want to call your attention to this matter here, the meeting of January 2, 1900, I will ask you whether those are the minutes of the meeting—I will ask you who were elected directors on January 2, 1900?

Objected to as immaterial and not the best evidence, which objection was by the court sustained.

Q. Were you present at that meeting, at the time it was held?

A. No sir.

Q. When were you first informed after the meeting was held, that you were elected as director?

A. Mr. De Bois brought me that information.

Q. Immediately afterward?

A. No, in the regular course of travel I think.

Q. Mr. De Bois went up there?

A. I understand he was there.

Q. Did you know he was going there when he went?

A. I know when he started to go.

Q. Did he tell you you were elected a director?

A. Yes sir.

Q. Of each and all of these ten companies?

A. Yes sir.

Q. Did he tell you anything about being elected treasurer at that time?

72 A. Yes sir.

Q. That was on January 2nd, 1900?

A. I presume so.

Q. Did you qualify as treasurer?

A. If you mean by that giving a bond or taking an oath of office, I did not.

Q. Did you act as director of these ten companies after January 2, 1900?

A. I didn't give any bond.

Q. I mean you were prepared to receive all funds?

A. I was prepared to receive all funds, yes sir.

Q. You say there Mr. De Bois was elected vice president.

A. Yes sir.

Q. Now then, during all this time Mr. De Bois was your attorney for all four of you gentlemen, in reference to these four mining companies?

A. Well I don't know about that, when he did any work as attorney he was paid for it.

Q. He went up there and examined the records up there?

Objected to unless he knows——

Q. I want to know what you sent him up there for?

A. He went to attend the meeting of the stock holders.

Q. So that Mr. De Bois left here and went to Fort Scott in January, 1900?

A. I think that is correct as to the date.

Q. For the purpose of looking after your interests as holders of $250,000 of the capital stock of these ten companies?

A. He went with authority to vote that much stock.

Q. When he came home he informed you that you and him had been elected directors of these ten companies?

A. Yes sir.

73 Q. He also informed you when he came home that he had been elected vice president, and that you had been elected treasurer?

A. Yes sir.

Q. And since that time you have acted as treasurer of these companies?

A. Yes sir.

Q. Now, it was after that that you made that contract with Mr. Nelson, wasn't it?

A. Yes sir.

Q. Now, hadn't you been over to the Tulsa mine before you made this contract with Mr. Nelson?

A. No sir, I hadn't.

Q. Had Mr. De Bois or Mr. Guss?

A. Not to my knowledge.

Q. Had either of the defendants in this case been over there that you know of?

A. I understood that Greer, I understood from him—I have forgotten who was with him, made the trip over there once.

Q. Was Mr. Gray with him?

A. I wouldn't be sure, but what it was Gray and Greer.

Q. And wasn't that after you had owned this $250,000 worth of stock in the company?

A. I think so.

Q. And didn't he make a report to you of that mine there, that Col. Brown was running.

A. At that time.

Q. You talked to him about it?

A. Yes sir.

Q. He explained to you the switch that run out from the main line, out to the mine; he told you about the great big steam shovel that they had, that they were stripping the land with?

74 A. I don't remember anything about that.

Q. Didn't he tell you about how they were operating it?

A. He said they were stripping and loading in the wagons, as I remember it.

Q. Now, that was between January and May, 1900?

A. Well, not necessarily between those dates, my impression would be prior to January, you see this foreclosure took place prior to that.

Q. That was during the winter of 1899 and 1900?

A. I would think so, that would be my remembrance.

Q. Did he say anything to you about how much the output was from these mines when he was there?

A. I don't remember that he did.

Q. Did you ask him?

A. I don't remember that I did.

Q. You were then owners of one fourth of the stock in these companies?

A. Yes sir.

Q. These four defendants were, were you not?

A. Well, there was six of us in that.

Q. Well it included the four defendants?
A. It included the four, yes.
Q. And Mr. Greer went over there a purpose to find out what the values of the land were, didn't he, he had no other business?
A. I don't know that he had any other business; I think that was part of his purpose in stopping there.
Q. Didn't you assist in paying the expenses?
A. Yes sir.
75 Q. He went to investigate what these mines amounted to?
A. I think so.
Q. What this lease amounted to?
A. I don't know about the leases, only the mines, I think.
Q. He went to investigate fully the value of the interests you had in it, the $250,000?
A. Well, yes.
Q. Now were you there after that?
A. I wasn't there until sometime in the year 1901, I rather think about November.
That was after the contract, I never was there prior.
Q. You were there while this contract was in existence?
A. Yes sir.
Q. That must have been in 1900, the contract was made in May, 1900?
A. Oh, yes, November.
Q. Was Col. Brown there in charge of it?
A. Yes sir.
Q. Did you notice the steam shovel there?
A. Yes sir.
Q. Very powerful machinery for the purpose of removing dirt, was it?
A. It seemed to be powerful to get it to run, it didn't run easy though. They had it tipped over on one side and talked about its power a great deal, but they were taking out all the coal by hand.
Q. By that time the machinery didn't work?
A. It never had worked.
Q. Do you know how much they were taking out at that time?
A. Well I remember seeing two or three or four cars of coal nearly full, the wagons were hauling in and shoveling the coal into the cars.
76 Q. Now, Mr. McNeal, calling your attention to the 28th day of May, at the time this contract was made, isn't it a fact that Mr. Nelson came down here on a telegram you sent him?
A. It may be.
Q. And didn't you in that telegram say if he come down here you would pay his expenses down here?
A. That might be.
Q. And isn't it a fact that you had been corresponding with him and myself in reference to their buying his stock or he buying yours?

A. Yes sir I remember that part of it.

Q. Now, didn't you pay his expenses for coming down here?

A. If I agreed to I did, I don't remember, I probably did.

Q. Don't you remember after he come down here, he offered you $5000. for your one fourth interest in these mines?

A. No sir.

Q. You don't remember that?

A. No sir, he would have got it mighty quick if he had.

Q. Don't you remember at that time, the discussion was this way between you and him, that you would have to own the controlling interest or he would, and that was the only way possible to manage that so as to make anything out of it?

A. No his statement about that was that Brown wasn't treating him fair, and if we had it instead of him——

Q. If you had the controlling interest you could bring Brown to time?

A. He thought on account of their previous deals he couldn't do as much as we could with Brown.

Q. You say he didn't make any offer to you for your stock?

A. No sir.

Q. Do you remember when this contract was written?

77 A. It was written right at the time he was here.

Q. Do you know who wrote it?

A. I think I dictated it.

Q. And you dictated it just as you wanted it and he signed it?

A. We agreed on the contract.

Q. General terms, and you dictated it?

A. I think that is correct.

Q. Now at that time didn't he say in a talk there, he found out that Mr. Greer had been over there since he had been there, and that he knew more about the output of the mine than he did?

A. I didn't so understand it.

Q. Didn't he tell you that he hadn't been there for six months?

A. I don't so remember it, the idea I had that he had been there quite recently.

Q. Didn't he say to you that your people had been there since he had?

A. No sir.

Q. Didn't he say to you that Mr. Hagan who at one time talked about getting an interest in these mines, said that if he ever got an interest he would make that mine produce twenty car loads a day?

A. No sir.

Q. Did you believe that that mine was then producing 20 car loads every day and had been all winter from what he said?

A. I didn't have any reason to dispute his word.

Q. Did you believe that, I just want to know that?

A. I took it with a little grain of allowance, or I would have paid him a little more for the stock.

Q. You knew if there was 20 car loads a day there, of 30 tons

to the car, and you got five cents a ton, how much would
78 that be a day?

A. About $30.

Q. 30 tons and 30 cars, a dollar and a half a car?

A. We would get $1.50——

Q. That would be $30 a day?

A. We would only get three-fourths of five cents——

Q. I mean the company would be entitled to how much——

A. A dollar and a half a car, I mean to say.

Q. And that would be equivalent to $900 a month?

A. Yes sir.

Q. Then if you paid him $500, you were satisfied from his representations that you would get that five hundred back, and $400 more the first month afterward?

A. Yes sir.

Q. And by the first of March, you would have $4,500 to pay for the deal, is that how you understood it?

A. I understood from what he said——

Q. Well if I understand, you believed what he said, as I understand you?

A. We rather believed it yes sir.

Q. And you thought you would get $900, and that would be $9,000 in ten months, which would pay out the $5,000 and leave you $4,000 more as a profit, in ten months before the option expired, is that the way you understood it?

A. I didn't expect to get quite as good a thing as that.

Q. You knew if there was only two carloads a day there, at five cents a ton, that it would amount to $3.00 a day.

A. Well, not to us.

Q. I mean to the company?

A. Yes sir.

Q. And three dollars would amount to $90 a month?

A. Yes sir.

79 Q. And that would amount to $900 for the 10 months, wouldn't it?

A. Well, it would be about nine months' time.

Q. It would amount to over one thousand dollars a year?

A. Well, it would in a year, but we only had about three-fourths of a year.

Q. One thousand dollars would be ten per cent. on ten thousand dollars, wouldn't it?

A. Yes sir.

Q. And even if you got two car loads a day it would be a pretty good investment on ten thousand dollars?

A. Very good.

Q. Now, you received the royalties, how much royalties did you receive before the fourth of March?

A. Well, substantially $500, I didn't take time when I went to the bank this morning to pick it out.

Q. Did you receive royalties each month?
A. Yes sir, up until about three months ago.
Q. Now as soon as you received these royalties each month, you just distributed it among you four defendants?
A. No, I credited it to the Tulsa Coal Mining Company, and when we got a little amount, sufficient to justify a division, we divided it.
Q. Just divided it between you four, that is the way you would do it?
A. Yes sir.
Q. Now after the fourth of March you received it just the same?
A. Yes sir.
Q. You never offered to resign as treasurer?
A. No sir.
Q. After you made this contract, who was elected in Mr. Nelson's place as director?
80 A. U. C. Guss.
Q. Brown as president, De Bois vice president, Guss secretary, and McNeal treasurer, is that correct?
A. Yes sir.
Q. And you four were directors of the company?
A. Yes sir.
Q. Who was the fifth director, Mr. Gray?

Objected to——

Q. I want to know who acted in these companies after the contract was made?
A. I think Gray and Greer, probably, I don't remember now specifically.
Q. Is this statement here correct?
A. Yes sir that part here is correct about the officers.
Q. So that the only control of the division as far as you know, was in the hands of this company, you, Guss, Gray and Greer?
A. As far as the royalty part of it, yes sir.
Q. Wasn't all of the business transacted?

Objected to as a matter of law, which objection was by the court sustained.

Q. I will ask you, who authorized you to go and see Mr. Wright, the Indian agent?
A. We just did it among ourselves.
Q. Then you acted as the company, didn't you?
A. We were really representing ourselves in that matter, because we held fifty per cent. of the stock.
Q. Who was the company at that time?
A. Well there was these parties here that had stock, and Emmett Brown.
81 Q. Did anybody have anything to do in controlling or managing or transacting the business of the company, except Col. Brown and you four?

A. I don't think so. We only made a change of Guss and Nelson, that is the only change. Brown was originally president, I was originally treasurer and De Bois was originally vice president.

Q. Do you remember of Mr. Guss and Mr. Greer coming to Fort Scott sometime in the summer or fall of 1899 in reference to these coal companies?

A. I remember the trip, yes sir.

Q. Do you remember of a report that they made to you and to the other directors?

Objected to as immaterial, which objection was by the court overruled, to which the defendants excepted.

Q. Do you remember the report they made?

A. In a general way.

Q. Did they say anything at that time about having seen an opinion of Mr. Perry, an attorney, as to the validity of these leases?

A. I don't remember, they spoke of your opinion, I remember.

Q. Do you remember Mr. Perry's and Col. Richards'?

A. I remember Col. Richards', but I don't recall Mr. Perry's now.

Q. W. C. Perry, of Kansas City, used to be U. S. district attorney?

A. I have forgotten about that part of it, I don't think I saw that myself, and I don't remember that they reported it.

Q. Do you remember of seeing or hearing them report the opinion of Senator Baker, as to the validity of these leases?

Objected to as immaterial, which objection was by the court overruled, to which the defendants excepted.

Q. Do you remember the opinion of Senator Baker?

82 A. I don't remember that now.

Q. Now, Mr. Greer and Mr. Guss went up there expressly to investigate these companies?

A. Well, that was a part of their trip, it wasn't the whole of it.

Q. That was the only business they had at Fort Scott?

A. That is what they went to Fort Scott for.

Q. And when they came home they reported to you, that is, they talked to you about the results of their business?

A. Yes sir.

Q. And that was in the summer or fall of 1899?

A. I rather think so.

Q. Before this contract was made?

A. Yes sir, before the contract was made.

Q. Didn't they on that trip also go to Tulsa and look over the mine there, on that same trip, stopped at Tulsa on their way home?

A. Mr. Greer and Mr. Guss, was it,—I don't know whether that is the same trip that Mr. Greer visited the mines or not; it is possible now that it is the same time he visited the mines, I am not clear, I know he visited the mines and reported and visited Fort Scott and reported.

Q. Now, you say that you found that those other leases were not

occupied, were not operated, none but the Tulsa lease, is that a fact?

A. That was our information at Muscogee, yes sir, from inquiry, and also from the Indian commissioner at Muscogee.

Q. Did you ever go over these leases to see whether they were operated?

A. No, I went on the railroad, is all; I crossed where the railroad crossed is all.

83 Q. Did you ever go around, here is 1,100,000 acres of land, did you ever make any investigation at all?

A. I never traveled over it, no.

Q. I will ask you to state whether this Exhibit "F" (inserted at page 48) is the plat that Mr. Nelson showed you?

A. It was a blue print; the general contour of these division lines was very similar to this, but it wasn't this kind of a piece of paper.

—. Did it appear to be a blue print of this?

A. Yes sir.

Q. Had it spots on it where they were working it?

A. I don't see it on this.

Q. Calling your attention to these marks like that, and this, and this, and this, and this, did you notice marks on that blue print of that character?

A. Yes sir.

Q. Did he tell you that here is where the Tulsa mine was?

A. Here is the Tulsa mine; the first depot beyond Tulsa there is a little branch goes out; Dawson I think is the name of the depot.

Q. Did you keep the blue print?

A. I kept it for awhile, but I sent it to Washington.

Q. Did you ever go to this place to see if there was any places dug out?

A. No sir.

Q. You don't know to this day whether there is any prospecting there or not?

A. No, only from inquiry there.

Q. You know that they built, at a very large expense, or graded a line of road down here to Twin mountains, about 11 miles long?

84 A. Ten or eleven miles, down along here.

Q. Cost about thirty thousand dollars, didn't it?

A. I don't think it cost that much.

Q. Do you know anything about *what* the value of building a line of railroad of that kind,—don't you know that these companies, for the purpose of getting down from Fort Scott to right here, graded a road and intended to build it down here to Twin Mountains, about 11 miles?

A. I know a great deal about that, more than I want to, I know the company——

Q. Now haven't you sold it under sale as a part of the property of this company?

A. No sir, they were made defendants in that sale.

Q. Exactly, and sold it at master's sale, as the property of this Tulsa Coal Company?

A. Only in part, they were one of the companies.

Q. You now claim to own that by reason of the sale of that property; you claim to own that, you and these defendants do, claim to own that by reason of a sale made by a master under a decree of the court over at Muscogee?

A. Foreclosing whatever interest Brown and Parker might have had, and the company was made defendants, for the reason that they claimed that their right to build the road was under the Creek law.

Q. You wanted to foreclose the interest of the company, whatever that might have been?

A. Yes sir.

Q. There is about eleven miles of that isn't there.

A. I guess there was.

Q. That is the abutments and all the bridges and the grade was built, all in nice shape?

85 A. Yes sir, stone culverts.

Q. And the grade there today is in nice shape, or the last time you saw it?

A. I haven't seen it for four or five years now.

Q. Mr. McNeal I want to ask you again; I didn't understand exactly what your answer was; I want to ask you whether you were ever over to Tulsa before you made this contract with Mr. Nelson?

A. I was now.

Q. Mr. Greer and Mr. Guss were over there?

A. I think it was Greer and De Bois, I wasn't sure when you asked me, but since I have talked with him and found it was Greer and De Bois.

Q. Now if those leases were valid and legal and without dispute on that eleven hundred thousand acres of land, what in your judgment would those leases have been worth?

Objected to—overruled.

A. I would have regarded them as very valuable.

Q. Worth several million dollars, wasn't they?

A. I should say a million any way.

Q. And do you want the court to understand that when Mr. Nelson stated to you that these were valid leases, and without dispute, that you believed that they were valid and without dispute?

A. Well, I had no reason to dispute all the evidence he produced, your opinion and——

Q. No, no, but I mean that because he said so, that you relied upon his statement, that these leases were valid and legal leases?

A. Well, I relied on his statement, I expect in my mind I had a doubt whether they would come out that way.

Q. Didn't you rely more upon the written opinion of law-
86 yers that you had examined, you and your associates had examined, and upon the examination of that Mr. De Bois had given of it, as your attorney?

A. Well his opinion seemed to be based upon the opinion of his attorney.

Q. Well, wasn't his opinion entirely based upon the opinion of his attorneys which were presented to you?

Objected to—overruled——

A. The statement- of Nelson, I took it, were primarily based on the opinion of his attorneys.

Q. Which he delivered to you?

A. He delivered a copy of these two opinions.

Q. And you still have them?

A. I think so.

Q. I believe you stated you had examined that mine since November, 1900?

A. I think it was November.

Q. Don't you think that that mine there was capable of producing 20 car loads a day?

A. Well, I would think that men enough could get that much.

Q. No trouble about it if it was operated?

A. I think that the mine could have given twenty car loads a day.

Q. Then do you mean to say that twenty car loads had theretofore been taken out, that you relied on that and that induced you to enter into this contract?

A. He said that they were taking out twenty car loads a day.

Q. You knew what they had taken out before, that was all explained in full to you in the purchase of this stock?

87 A. Well there was this much of that, he claimed that there was an unaccounted for balance that ought to be accounted for, that Brown had taken out.

Q. Didn't he also state that Brown wasn't treating him right?

A. Yes, sir.

Q. And that he couldn't control Brown and that he thought you could control him better than he could?

A. Yes, sir.

Q. Now when he delivered that stock to you, didn't he assign it on the back of it in blank?

A. Well I think if I remember, he did. All the stock as I remember it, was assigned in blank on the back.

Q. In the blank assignment?

A. Yes, sir.

Q. When you sent that stock to him at Fort Smith, did you again reassign it to him?

A. No.

Q. What did you send to Fort Smith?

A. Just the stock.
Q. You didn't send the seals?
A. No sir.
Q. Or none of the books?
A. No sir.
Q. Neither did you resign as director or president or officers of the company?
A. No sir, I did not.
Q. You have been officers and directors ever since?
A. Well, I never heard of any subsequent election.
Q. None of you ever have been in any or transferred or changed the government of that corporation since then?
A. No sir.
88 Q. So that nothing whatever has been done by the corporation since then; it has been under the control of the same parties that were then controlling it?
A. Well, I think that would be true, I never heard of any stockholders' meeting and never attended any.
Q. Well, you have done nothing since then except to collect royalties?
A. Yes, sir.
Q. You have practically abond-ed it, is that as I understand you?
A. I still have one fourth interest, whatever it is worth.
Q. Didn't you understand that in order that Mr. Nelson could benefit himself at all by the transfer of that stock to him, that he should have control of the bank account?
A. No, I don't know anything about that.
Q. Did you intend still to control the company, notwithstanding you transferred the stock back to him?

Objected to for the reason that the same is argumentative which objection was by the court sustained.

Q. Now did the board of directors ever declare a dividend on the stock?
A. I don't think there was a formal meeting; the dividend was paid out but just by agreement; the moneys to the extent of $500. was refunded, one fourth each to McNeal, Guss, Greer and Gray, after that whatever dividend was paid, if any, I am not real clear that there was, was paid out to the six stock holders by agreement among us six, that whatever come to the holders——
Q. Now was there any dividend paid to Senator Baker for the $50000 worth of stock he held?
A. I didn't know he held any.
89 Q. Don't the books show?
A. I don't know that they do.
Q. Was there ever any dividend ever paid to him?
A. Nos sir.
Q. Was there any dividend ever paid to Mr. Parker who owned $50,000 of the stock?

A. No sir.

—. Was there any dividend ever paid to Mr. Dollripple who owned $5000 of the stock?

A. No sir.

Q. All that dividend was divided between the defendants in this case?

A. We purchased all that stock in the deal with Mr. Nelson as I understand it, it was delivered to us.

Q. All that paid out was paid to the four defendants in this case?

A. Well, up to the amount of $500.00 and after that it was divided into six parts.

Q. Who were the other two?

A. Spurlock and De Bois.

Q. They bought an interest in the stock, did they?

A. They originally had each a one-sixth interest in the $250,000 stock, but they weren't parties to the optional purchase of the half million from Nelson.

Q. Now did you defendants ever tender back to Mr. Nelson the dividends you received while you held this stock on an option?

A. No sir, it belonged to us.

Q. That is the way you looked at it?

A. Yes sir.

Q. Then you had the title to the stock for awhile?

A. Yes sir.

Q. That is the way you looked at it?

90 A. Yes sir, we were to get all dividends up to the fourth of March, all royalties.

Q. You never offered him back anything that you received while you had that option?

A. No sir, after the fourth of March, I made a separate deposit.

Q. But you never offered after the fourth of March to pay him anything?

A. No sir.

Q. Did you ever declare a dividend after the fourth of March?

A. It was divided under the arrangement as fast as the royalties came in.

Q. To whom was it divided?

A. One third of it went to us six fellows, and two thirds of it was put to the credit of J. T. Nelson.

Q. Did you ever send him a check for it?

A. No sir.

Q. Did you ever offer it to him?

A. No sir.

Q. Did you ever write to him that it was there to his credit?

A. No sir.

By the COURT: It is in the hands of the treasurer for him?

A. No, it is deposited in the Guthrie national bank.

Q. It is in the hands of the treasurer of the company, subject to his check?

A. Yes sir, I suppose it is down there.
Q. Is it deposited to the credit of Mr. Nelson in the bank?
A. Yes sir, every month.
By Mr. BIDDLE: Do the bank books show it was deposited to Mr. Nelson's credit?
A. Yes sir.
Q. Do the bank books show that?
91 A. Yes sir.
Q. Was that after the first of March?
A. Yes sir.
Q. What bank was it?
A. Guthrie national bank.
Q. You never notified him at all about it, and you were the treasurer of the company?
A. No sir.
Q. I will call your attention to this paper which the stenographer will please mark Exhibit "G" and ask you to state whether he showed you that at that time, at the time of the entering into of this contract?
A. Something very similar to this.
Q. Isn't there a copy of that with the papers which he delivered to you?
A. I don't seem to be able to find it; I hunted for something of this kind, but don't seem to find it.

Here the same is offered in evidence as Exhibit "G."
By the COURT: Any objection, gentlemen?
By Mr. DE BOIS: I didn't get to examine it, but I think not.
The same is as follows:

EXHIBIT "G."

KANSAS CITY, Mo., January 1st, 1897.

Hon. E. B. Childers, national treasurer of the Creek Nation, Wagoner, Ind. Ter.

DEAR SIR: The amount expended by the ten (10) following named coal companies in developing the coal interest of the Creek Nation up to this date, is as follows:—

92

By "The Tulsa Coal and Mining Company.....	$685.00
By "The Sapulpa Mining Company.....	789.00
By "The Choctaw Coal and Mining Company.....	275.00
By "The Wewaka Coal and Mining Company.....	365.00
By "The Concharty Coal and Mining Company.....	618.00
By "The Broken Arrow Coal and Mining Company.....	457.00
By "The Catoosa Coal and Mining Company.....	385.00
By "The Neyaka Coal and Mining Company.....	342.00
By "The Red Fork Coal and Mining Company.....	598.00
By "The Gar Creek Coal and Mining Company.....	683.00
	$5197.00

I hereby certify that the above amounts are correct and that the said amounts have been spent in developing the coal interest of the Creek Nation, Ind. Ter.

J. T. NELSON,
Secretary of the Above Companies.

WAGONER, I. T., Jan. 15th, 1897.

Mr. J. T. Nelson, sec'y mining companies.

DEAR SIR: Upon investigation of your statement of expenditures of your companies in prospecting for coal in our nation, I find it to be correct and just.

Yours truly,
E. B. CHILDERS,
Treasurer Creek Nation, Ind. Terr'y.

Q. To refresh your recollection, didn't he say that Mr. Childers, the treasurer of the Creek Nation went clear to Ft. Scott to examine the books of the company before he would sign this?

A. I don't recollect that part but he might have.

Q. Do you know where and on what of those leases any of this money was expended, did you ever make any examination?

A. No sir, unless the work at the Tulsa might have been a part of it.

93 Q. I want to call your attention to this Exhibit "H," I will ask you to state whether that is your signature?

A. That is my signature, yes sir.

Q. That is a letter you wrote to Mr. Nelson?

A. I guess it is to you.

Q. You sent it by mail to me, did you?

A. Yes sir.

Objected to as incompetent, irrelevant and immaterial, which objection was by the court overruled, to which the defendants excepted.

Here the same is offered in evidence as Exhibit "H."

Objected to as incompetent, irrelevant and immaterial, which objection was by the court overruled, to which the defendants excepted.

By the COURT: It may go in evidence as far as McNeal is concerned; it couldn't affect the others.

The same is as follows:

4348.

J. W. McNeal, President. A. J. Seay, V. Pres.
W. J. Horsfall, Cashier.

Guthrie National Bank.

Capital, $50,000; Surplus, $10,000.

GUTHRIE, Oklahoma, June 27, 1899.

W. R. Biddle, Fort Scott, Kansas.

DEAR SIR: Your letter of the 23 received. Mr. Guss has been away nearly all the time since you wrote. I have seen him but for a few minutes since writing my last letter. The principal
94 question I asked Mr. Nelson was, "Will the present officers of the company recognize the sale of stock and issue new stock to the present owners of said stock." You will understand that we conducted a sale under the terms provided in the promissory note for selling collateral attached. We would rather work with Mr. Nelson and those who own enough more stock to make a control than to buy more stock under the present conditions. Fearing that we may be throwing good money after bad.

I wish you would have Mr. Nelson or those holding stock make us a proposition for the low dollar that would buy enough stock to give us control.

Yours truly, J. W. McNEAL.
C.

Q. At the time you wrote this letter, you owned the $250,000 worth of stock?

A. Yes, sir, that is the six of us.

By Mr. HORNOR: You may state whether at all times since the fourth of March and on the 4th of March, 1901, you have been ready, willing and able to turn back to Mr. Nelson all of the property called for under this contract in question?

Objected to for the reason that it calls for a conclusion and is incompetent, which objection was by the court overruled, to which the plaintiff excepted.

A. I wanted to turn back the stock, and the question arose about whom would we turn the records and seals to.

Q. You may state whether or not you are willing to do so now?

A. Yes sir.

By Mr. DE BOIS: You were asked in regard to that 11 mile railroad grade which you bought under foreclosure of the district court for the northern district of the Indian Territory, now did
95 that have anything to do with this deal at all, the purchase of that?

A. Not a thing, that was levied on as the property of Brown and Parker.

Q. The sale of that come from another matter, not from anything pertaining to this stock?

A. Not at all.

By Mr. BIDDLE: Do you want it understood that you didn't levy on that property as the property of the Sapulpa Mining Company?

A. No sir.

Q. You don't claim title then at all by reason of that levy, because it was levied on as the property of the Sapulpa Mining Co.?

Objected to——

By the COURT: I understood Mr. McNeal to answer in the original examination that in the proceedings to foreclose upon that property, he made the Tulsa Mining Company party defendant to dispose of any interest it might have in it.

WITNESS: The reasons for that were they claimed the authority to build it under one of these charters; Brown claimed by that charter he had power to build a road for full mining purposes, and if there was any claim by this company, it would foreclose it; but the debt was Brown and Parker's and they built the road on it.

By Mr. BIDDLE: You obtained a marshal's deed for that railroad right of way?

A. For that grade.

Q. Do you now claim title by virtue of those proceedings, through the title that the Sapulpa Coal Company here had?

Objected to as incompetent, irrelevant and immaterial,
96 which objection was by the court sustained.

J. D. DE BOIS, a witness for the defendants, being called and sworn, testified as follows:

Direct examination by Mr. HORNOR:

Q. You are acquainted with all the parties to this litigation are you, Mr. De Bois?

A. I am.

Q. Were you present when this contract was talked over?

A. I was.

Q. Who was present?

A. Well, I think that Mr. McNeal, Frank Greer, Harry Gray and Mr. Nelson and myself. Mr. Guss was advised as to the matter and he was present part of the time; I don't think he was present all the time.

Q. Where were you?

A. We were here in this town, down to McNeal's bank, I think.

Q. When was it?

A. Well, it was in May, 1900, the contract will show the date of it.

Q. Did you hear Mr. Nelson make any statement in regard to the subject-matter of this contract?

A. I did.

Q. At the time or just prior to the time when it was made?

A. I did.

Q. State what he said about it?

A. Well, Mr. Nelson claimed that he owned——

Objected to as not responsive, which objection was by the court sustained——

Q. State what he said, not what he claimed.

A. Well, in substance, I don't know that I can use the
97 identical words; he stated that the output of the mines over there in his judgment to the company were worth from thirty to forty dollars a day,——

Objected to as immaterial.

A. And that Mr. Ed. Brown was taking out at the Tulsa coal mine my recollection is somewhere from 15 to 25 carloads a day; I won't say the exact amount, something about that amount; I don't know that he said just so many cars, but something like that; and at any rate, the earnings of the company, to this company, if they had the proper receipts, under the contract were worth about thirty or forty dollars per day; he stated that owing to trouble between him and Mr. Brown that they weren't on friendly terms; and that Brown wouldn't recognize him, and didn't give him any consideration, and he thought that if this was all turned over to one company, to one set of men who had the controlling interest, there would be no trouble in getting these earnings right along; that Brown, as a matter of fact, was getting rich over there out of the proceeds that were due the company.

Q. What did he say about the leases?

A. He stated that the other nine leases were made, and that they had paid the necessary royalty and paid royalty on them, and that they had sunk lines or shafts on different leases and taken out coal at different places and then gave a description of the coal, he said the coal was good, in fact he believed the Tulsa coal was the poorest coal, that the coal down at Twin Mountains, some other mine was a better vein of coal, there was about a four foot vein down there that was very fine, he said he knew because he had gone there in person and taken the coal out and knew it was all right.

98 Q. Well, now, what if anything did he say about the quantity of lands that these companies had leases on?

Objected to as incompetent——

A. I think Mr. Nelson had a map with him that he exhibited, showing the amount which all the leases had, one hundred thousand acres, except the Sapulpa that had 120,000 acres in that lease, and he exhibited a map, I think this must be a copy of it. There

was a question raised as to whether the leases would hold good for that amount or not, and he claimed that they had sunk these shafts in special localities in each one, and he considered they were all right, as they had paid royalty on them and they would be good; that question was raised right there as to whether they would be good for the full amount or whether or not they would be bound under the Curtis act, but he claimed that they had under the Curtis act done sufficient improvements that would make it good for the amount of 640 acres any way, under the company's lease.

Q. What did he claim about having paid the necessary royalties?

A. He said they had paid royalties on all the leases, but he also stated that there was only one of them in active operation, and that was the Tulsa.

Q. I don't know whether I understand you or you understand me, when he said they paid royalties—what I am getting at——

A. —under the lease we understood this—that under the lease they were required to pay——

Objected to as to what he understood——

Q. I don't care what you understood——

By the COURT: The question you asked him was what was meant by these royalties, now let him explain it.

A. Under the charter of the Creek Nation there had to be so much royalty paid to keep these leases alive.

99 By the COURT: That was paid to the treasurer of the Creek Nation?

A. We understood that was paid to the United States——

By Mr. BIDDLE: Not paid to the treasurer of the Creek Nation?

A. Well, they was paid to keep the leases alive, that the necessary royalties to keep these alive from year to year had been kept up. You asked me which one, in all probability I believe he had paid to the Creek Nation so much in order to get these charters there.

By Mr. HORNOR: Well, he said all the necessary royalties to keep them alive had been paid?

A. That was my understanding or substantially what he gave us to understand.

Q. Did he say that?

A. Yes sir, that is what he said, he explained it that he had paid royalties on all of them, because I remember very distinctly the question was asked if they had failed to sink shafts on one of these leases, wouldn't it abate it, and he exhibited a map, showing where they had put a hole in the ground at each place and taken out coal, in keeping with the contract, and marketed it, I believe he said,—one of these others he claimed this, that he had hauled the coal from the mine in wagon loads and delivered it somewhere.

Q. Which one of these leases was it he said had 120,000 acres?

A. The Sapulpa.

Q. And all the rest 100,000?

A. Yes sir.

Q. Well now, Mr. McNeal was asked about your going over there, you may state the circumstances in regard to that.

A. Well, I went over there twice.

100 Q. When did you go first?

A. Mr. Frank Greer and myself went over there.

Q. When did you go first?

A. I don't know just that time, I can't say as to the date, it occurs to my mind it was a short time after this purchase Frank Greer and I went over there.

Q. State what did you do when you went over there?

A. Well, we went to the Tulsa mine, went down to the mining camp and expected to see Mr. Brown. Mr. Brown was president of this company and also the man who was operating it for the Kansas & Texas Coal Company, and when we got there Mr. Brown was away and we couldn't get to see him, and we asked the bookkeeper then to allow us to see what the outputs were, and we couldn't get that information.

Q. Why?

A. They claimed they weren't giving out information there; in kind of a way he told us——

Objected to as not binding on the plaintiff, and as incompetent, which objection was by the court sustained.

Q. You didn't get to see the books then?

A. Well, the books were there, we didn't get to go over them. I don't believe we did on that occasion, Mr. Brown showed the books afterwards, I don't believe we did. But at any rate I will say this, we were trying to get information there and we couldn't get any information there satisfactory at all, we weren't advised when we come away as to the condition of things there.

Q. Who is this man Brown that you talk about?

A. Well, Brown was the party who claimed to have some interest, one or two others in it, and also the president of these various mining companies; the president of the board of directors, and

101 he also was the manager for the Kansas & Texas Coal Company that was operating this mine under that sub-lease.

Q. Your trip over there then was after this contract was entered into?

A. That is my recollection, a short time afterward, I am pretty certain it was.

Q. What did you do then, come home? Is that the substance of what you did on that trip?

A. Yes sir, in fact that was substantially—I believe we went down to Muscogee and saw some statements there, some returns, and I think we saw the books at Muscogee of the United States agent where there had been some royalty paid, but the agent wasn't there; they weren't in a shape there to get the information we wanted.

Q. Then you came home?

A. Yes sir.

Q. Did you ever go over to that country again on any of this business?

A. I did.

Q. When was that?

A. Well, it was sometime in the fall of 1900.

Q. What did you go over there that time for?

A. We went over there to ascertain what the output of that Tulsa mine was, and to see if we could put into operation some of the other mines.

Q. Who did you go to see?

A. We first went to the Tulsa mine and saw Mr. Brown and saw them while they were operating the Tulsa mine, and he went with us over the ground, he was there; Mr. Guss and Mr. McNeal and myself were the parties that went.

Q. When you went over there the first time, could you tell
102 from what you could see there, or your investigation, how much coal was being taken out of the mines?

A. I could not; they weren't in shape; they had a three mile track run down there from Dawson, the Kansas & Texas Coal Mine Co. they had a track running into the mine from Dawson, and had some ten or fifteen tenement houses there, but they weren't in a shape to get any information as to what the output was.

Q. On this second occasion when you went down there, what did you find out?

A. Well, just about that time Mr. Brown had the week before that or a short time before that received a great machine there for the purpose of taking the dirt off by machinery, and maybe he had operated it just a little, but they were idle when we were there, they weren't at work that day.

Q. Who was with you at that time?

A. McNeal and Mr. Guss.

Q. Did you find out how much coal was being taken out or not or were they stopped?

A. Yes sir, Mr. Brown on that occasion went over the books with us and give us a statement.

Q. How much was it?

A. About two cars a day. Now it averaged that, my recollection is, from one to three cars, but we estimated about two cars a day.

Q. Did you go to Muscogee then?

A. We did.

Q. What did you do then?

A. We saw the United States Indian agent there, that is the collector of these royalties appointed by the Secretary.

Q. What was your object in seeing him?

103 Objected to as incompetent, hearsay and not in any way binding on the plaintiff, which objection was by the court overruled, to which the plaintiff excepted.

A. We went down there, as I stated, with the view of opening up two of these mines, and we were advised of course by Mr. Brown that we would have to get a permit, that that was the only way, that these companies hadn't paid the royalties, and so we went down to see the Indian agent, and we told him we had leases and wanted to go out and operate or open up two of these mines and also we represented to him that holes had been dug and coal taken out etc., and that we had vested rights there and wanted to go on it, and he says I am representing the Secretary of the Interior here, and he says If you men go out there and open up those mines you will be arrested; he says They have never paid a dollar royalty, and you have got no lease, he says, I wouldn't permit you to, that is all there is to it. He says, With all due respect to you men, if you go out there and open up those mines, you will be arrested. And we thought that that four foot vein of coal was worth being looked after, and we told him that, and we told him that we thought we had vested rights there that ought to be looked after, and he said that didn't——

Objected to as incompetent——

By the COURT: It is not binding on anybody.

A. Well, he forbid us going in there at all.

By the COURT: Who was that you were talking to?

A. That is—what is his name—J. George Wright, was the man, he was the commissioner at the time.

By Mr. HORNOR: Did you do anything more on that occasion?

Q. I will state, yes, before that, at Vinita, before we got down to Muscogee, we saw Mr. Soper and we told him what we wanted
104 and we talked with him at the depot there, and he says You men needn't go, you can't get in; he says, You men can't go down there and open up those leases, it is all right for you to go down and see, but he says your trip is needless. Mr. Soper was the U. S. district attorney for that district.

Q. Then you came home did you?

A. Yes sir, we came home.

Q. McNeal and Guss were with you?

A. Yes sir.

Q. Now, a little prior to the 4th of March, 1901, I will ask you to state if you know what was done by the defendants in reference to notifying Mr. Nelson in regard to what they would do about this contract, if you know?

A. Yes sir, I know.

Q. You may state what was done?

A. Mr. McNeal left here for Washington, and on the 4th day of March he was away. A few days before his leaving we had canvassed the matter——

Objected to—sustained.

A. (con.).—and he says——

Objected to—sustained.

Q. State what you did.
A. They notified Mr.——

Objected to——

By the COURT: The objection is well taken, state what you did.
A. We had a meeting and all agreed to——

Objected to——

By the COURT: The objection is well taken. That is not an answer to the question. What did you do as far as Mr. Nelson is concerned.

105 A. What I done would be no authority if I haven't shown what they instructed me to do, that is, we had a meeting and I was instructed to do this; I don't know what they did in the meeting; I know what they instructed me to do at the meeting, and they instructed me to notify Mr. Nelson, at the meeting.

Q. When they instructed you to notify him, what did you do?
A. I notified him, I wrote him a letter and sent him a telegram that these parties on the 3rd day of March——

Objected to——

A. (con.). I wrote him a letter and I think I sent him a telegram,—I am not certain I did both, but I did one I know, notified him that the shares of stock and stuff——

By the COURT: What the notice contained is not proper.

Q. You say you wrote a letter, state what you did in reference to whether you sent that or not?
A. Yes sir, I did, I posted it here at this postoffice, addressed to Mr. Nelson at Ft. Smith, Arkansas.
Q. Was stamps on it sufficient to carry it?
A. Oh yes.
Q. Did it have a return card on it?
A. Yes sir, one of my office envelopes.
Q. Did it ever come back to you?
A. It did not.
Q. State what the contents of the letter were?
A. Well, I just stated to him that the certificates of stock which he had turned over to these parties and papers, etc., were at the Guthrie national bank for him, and I am inclined to think that in that letter,—I did it in one of two letters and I think I did in that one, I told him if anything was done in this matter, it would have to be by a subsequent contract, that the parties were not willing to pay him the $4500; that if anything was done further, that

106 he would have to make another contract; that upon that it would not be considered further, and that I would be at Ft. Smith,—I wrote him two or three letters pertaining to that, and I would be at Ft. Smith in two or three weeks, and if we could make a new deal, I would see what could be done. Now, I will state I

am positive that that letter,—I know it was written before the 4th of March, because that is what it was done for, the reason I did it, I had got a letter from Nelson that I received that morning, saying that he got a letter from——

By Mr. BIDDLE: Wait a moment——

A. (con.). Well, I received a letter from Mr. Nelson, and I think in that letter at the last demanding urgent action, and I called Mr. Guss——

By Mr. BIDDLE: Wait a minute—objected to——

By Mr. HORNOR: What day was this that you are talking about now?

A. This was the third day of March.

Q. Did you say you sent a telegram?

A. Yes sir.

Q. Where did you send that?

A. I am positive I sent a telegram because I was using every means to give him notice that day at Ft. Smith, Arkansas.

Q. Where was Mr. Nelson's home from the time this contract was made up until after the 4th of March, if you know?

A. Well, for quite a long time he was at Ft. Scott, Kansas, but for a month or so we had learned that he was at Ft. Smith, Arkansas, and we received communications from him at that place.

Q. Did he ever live in this Territory to your knowledge?

A. Not to my knowledge. One matter more, Mr. Hornor, I wanted to state this, that that letter,—after receiving that letter, I
107 felt like it was necessary that these people do something toward——

Objected to as argumentative, which objection was by the court sustained.

By Mr. BIDDLE: I understand you that you received this letter ..d these two cards?

A. Yes sir.

Q. And they are in his handwriting?

A. Yes sir—I received another one I think——

Q. I am asking you about these?

A. Yes sir.

Plaintiff here offers in evidence the papers identified by the witness, marked Exhibits I, J, and K; and there being no objection to the same, they are as follows:

EXHIBIT "I."

FT. SMITH, ARK., M'ch 1st, 1901.

John D. De Bois, Esq., Guthrie, Okla.

MY DEAR SIR: Your favor of the 26th to hand and noted. Also one of even date from McNeal.

To say the least they are anything but satisfactory and I do not

believe you people have any legal right for such treatment of a contract.

It is no fault of mine if you have not got your matter in shape. All I want them to do is to abide by the agreement "I. E." Either send me the money or the stocks, books seals and resignation of the officers you have elected by the fourth of this month. This was the contract and I shall exact it to the letter if it is possible to do so.

I do not know McNeal's Washington address, but you can notify him and the others and act accordingly.

Yours truly, J. T. NELSON.

108 EXHIBIT J—(Postal Card).

M'CH 29.

Why don't you let me hear from you?

J. T. NELSON.

Postal card. One cent. United States of America. This side is for the address only. (Postmarked) Fort Smith Ark. Mar. 29, 1901, 3–30 p. — Jno. D. De Bois, Guthrie, Okla. (Postmarked) Guthrie, Okla. 1 p. m. Mar. 31, 1901. Rec'd.

EXHIBIT "K"—(Postal Card).

Wire me if you are not going to be here on the FIRST.

J. T. NELSON.

Postal card. One cent. United States of America. This side is for the address only. (Postmarked) Fort Smith, Ark. Mar. 30, 12–30 p. m. 1901. John De Bois, Esq. Guthrie, Okla. (Postmarked) Guthrie, Okla. 6 a. m. Apr. 1, 1901. Rec'd.

By Mr. HORNOR: After the 4th of March, did you do anything further in regard to this stock?

A. Yes sir.

Q. State what?

A. On April 1 Mr. McNeal had returned, and I went down there and he delivered me the stock that Mr. Nelson had turned over to him; I took it to the Wells-Fargo Express Company and expressed that stock to Mr. Nelson, addressed to him at Ft. Smith, Arkansas, and received this certificate.

Q. You got a letter from him saying he wouldn't accept it, too, didn't you?

A. I did.

109 Here the same is offered in evidence, marked Exhibit "L." There being no objection, the same is as follows:

Office of J. E. Marshall, Real Estate and Loan Agent, No. 8 N. Seventh St.

FORT SMITH, ARK., April 17th, 1901.

J. W. McNeal, Esq., Guthrie, Okla.

DEAR SIR: I received word to-day that you had sent the stock. The same will remain in the office subject to your order as I will not accept it.

Yours truly, *Yours truly,* J. T. NELSON.

By Mr. BIDDLE: Mr. De Bois, at the time that Mr. Nelson was here on May 28, 1900, the date of this contract, how long on that day did those negotiations detain you, between these gentlemen and Mr. Nelson?

A. Well, I am not certain, but I think that Mr. Nelson came here one day and maybe went away that night, or maybe one day and stayed here the next day.

Q. They were negotiating back and forth quite considerable time, were they not?

A. While here?

Q. Yes.

A. Yes sir, I think that they met twice, perhaps. My recollection is now that we were down at the Guthrie national bank once, and maybe we had a little talk at the Bank of Indian Territory once, but it was some little bit.

110 Q. Do you remember that in those conversations that Mr. Nelson and Mr. McNeal both expressed the idea that it was necessary for some person to get a controlling interest in the mines so as to bring Col. Brown to time and make him show up?

A. I remember Mr. Nelson saying that Brown, owing to the condition—I don't think McNeal said anything about it,—but owing to the condition of the feeling between him and Brown he wanted to sell, and then stated what they were doing there, and that he hadn't been able to get a settlement from Brown.

Q. Don't you remember McNeal saying that they had had $250,000 of stock for some time and had never realized a cent of profit from it?

A. No, I don't remember McNeal saying anything about it.

Q. The fact is that at that time none of the stock had received any dividends that you know of?

A. None that I knew of.

Q. And the business of running the mine over there had been very unsatisfactory, as you understood it, with all of the stockholders that is Mr. Nelson and your people?

A. Yes sir. Mr. Nelson had urged that there was a large income over there, and that they should make some changes whereby they could get the revenues.

Q. Wasn't that your opinion too, that Col. Brown was taking it all?

A. Yes sir, that is the way I thought that Col. Brown was getting rich over there.

Q. Didn't you believe he was getting rich over there?

A. No, I didn't think so.

Q. Didn't you know he was making money over there?

A. No, *I* believe he lost ten thousand dollars for the coal company he was working for.

111 Q. No, I mean didn't Brown make money?

A. No, I don't think he did. I don't think he made a dollar, only a living.

Q. Wasn't that the talk?

A. Yes sir; Mr. Nelson stated there that they were doing big work there and he had been following it up; that he had at one time been to St. Louis and seen the manager of the Kansas & Texas Coal Company, Hobart, and that there was a large output there, that he believed Brown was making $30 or $40 *dollars* a day.

Q. He didn't pretend to know what he was making?

A. He stated he had a right to know.

Q. He didn't claim to have any personal knowledge about it?

A. He claimed from his knowledge of it, yes sir, he stated that as a fact, I think.

Q. Now, as a matter of fact, at that time he told you, didn't he, that the Kansas & Texas Coal Company were running that mine?

A. Yes sir.

Q. That Brown was for those people, that——

A. Well, I won't say he did say it in that way, but he did say Brown was over there.

Q. He told you Hobart was the general manager of the Kansas & Texas Company?

A. Yes sir. He said he would see Hobart and would see if he couldn't make a deal; he said Brown was the agent for Hobart, and I am inclined to believe that we got that information a little later.

Q. Here is a lease, did you see this lease at that time?

A. No, I didn't see that lease at that time; I didn't see that lease for a week or ten days afterward.

Q. This lease was sent down with the papers just after the contract was closed?

112 A. Yes sir, I think that lease was with the papers, but I didn't see it for a week afterward; Nelson didn't have all these papers there.

Q. Did you note this provision in this lease "the party of the second part agrees to pay a royalty of ten (10) cents per ton for all coal taken out under this lease and contract, which shall be lump coal and well cleaned and merchantable, free from slate, sulphur and all foreign matter of every kind or character."

A. I don't know that I knew of it only in a way; I won't undertake to say whether I got knowledge of that lease personally;—I

know I never saw that lease until the papers come, but I am inclined to think——

Q. Now what connection did Mr. Nelson tell you the Kansas & Texas Coal Company had with this?

A. I don't remember just what he did say about that, I won't undertake to say.

Q. Do you remember how it happened that he mentioned Hobart?

A. Yes sir, he said he had been to Kansas City and saw Hobart——

Q. St. Louis?

A. Yes sir.

Q. Did he say why he went there?

A. Yes sir.

Q. What information did he pretend to get from Hobart?

A. I believe he was claiming that he had about made a deal at one time,—my recollection is he was there for the purpose of making a deal with Hobart, to see if he couldn't sell some of this stock.

Q. Didn't he say that Mr. Hobart had an account of all the coal taken out of this mine?

A. Not as I remember of.

113 Q. And that he could get the information from him as to the mine, the output of this mine?

A. No, I have no recollection of that.

Q. Now, after you saw this lease, you knew that the Kansas & Texas Coal Company got all of the output of this mine?

A. Less the five per cent.

Q. No, I mean all of the output of the coal.

A. Yes sir, after the lease come, but that was after the contract was made.

Q. That the Kansas & Texas Coal Company took every particle of coal that was mined at the Tulsa mine?

A. You refreshed my memory on a matter there. He did state that Col. Brown,—that the Kansas & Texas Coal Company was digging all the coal that Brown got out there, he stated that; I got that information that all the output of that coal that the Kansas & Texas Coal Company was getting.

Q. And that Mr. Hobart was the manager in St. Louis of that large coal company?

A. I am inclined to think that he mentioned that.

Q. Don't you remember he said he had gone down there to see just what the output was?

A. No, I won't undertake to say he went down there for that purpose he claimed to know what it was doing.

Q. Didn't he say to you at that time that he hadn't been to the mine since some of your people had been there, that your people had been there since he had?

A. No, he didn't say that, that I have any recollection of.

Q. Did you know how the Kansas & Texas Coal Company paid this 10 cents, did you ever know?

A. Not personally.

114 Q. Do you know how the Texas & Kansas Coal Company paid this 10 cents a ton?

A. Yes sir, I know what that contract says.

Q. Now, how did they pay that?

A. They were to pay to the Creek nation ten cents a ton, that is, five cents a ton, and the other five cents was to be paid to the coal company, but now, mark you, I didn't see that contract, and I am satisfied none of them saw it for a week after this contract was made.

Q. But they saw it shortly afterward?

A. I suppose they did, I saw it.

Q. Do you know why the Kansas & Texas Coal Company after that only paid two cents to that company?

A. Yes sir.

Q. Why was that?

A. Because notwithstanding this lease provided that these mines were to pay five cents a ton royalty to the Creek nation, the Secretary of the Interior made an order that all the leases operated in the Creek nation should pay eight cents a ton.

Q. So that after that order was made, the coal companies paid eight cents to the treasurer of the Creek nation, and two cents to your coal company?

A. Well, I will state that at first the Secretary of the Interior I believe charged ten cents, and as a matter of fact afterwards they cut it down to eight by order of the Secretary of the Interior.

Q. Now do you know of a solitary, single instance when the lessee under this lease failed to pay the royalty to the Creek nation, through the Kansas & Texas Coal Company?

115 A. No, I think they paid all the royalties.

Q. So that the Creek nation were always paid all the royalty demanded?

A. Yes sir, but to this Indian agent down there,—they hadn't paid it to the Indian agent,——

Q. They didn't pay it to the Indian agent, they paid it to the treasurer of the Creek nation?

A. I don't know about that, I thought you asked me what royalty was being paid to Mr. Wright, for the Creek nation.

Q. Do you know that Mr. Wright ever got a dollar of it?

A. After that, Mr. Guss and McNeal and I went down there and we inspected the books, and I have got a statement of it here.

Q. Isn't that simply a transcript from the treasurer of the Creek nation?

A. No, I think not, I know that royalty is not paid to the treasurer of the Creek nation, but is paid directly to the Indian agent, appointed by the Secretary of the Interior, who holds it in trust for the Indians.

Q. Now, isn't it a fact that previous to this ruling of the Secretary of the Interior, eight cents a ton should be paid, previous to that all the royalties were paid to the treasurer of the Creek nation?

A. I don't know on that, how the Secretary of the Interior——

Q. You don't know of any of these leases being forfeited by reason of the failure of the company to pay the royalty,—do you know of a single instance where the royalty wasn't paid?

A. No, I don't know personally that a dollar was paid in any of them.

Q. The fact is that the Kansas and Texas Coal Company kept out eight cents a ton for that purpose?

116 A. Well, now you are asking me—I know that like I know the other, personally I know the others never paid a dollar, like they kept that up, that is my information from the record.

Q. Now, as a matter of fact, they paid it just as promptly as the month came around?

A. I don't know.

Q. Were you ever at the Tulsa mine before this contract was executed?

A. No, I don't think—the time Greer and I went down there my recollection is was right afterwards. I never was there but twice; Greer and I at one time, and Guss, McNeal and I at the other.

Q. Do you remember of McNeal and Guss being down there before that?

A. No sir.

Q. Were you in Ft. Scott in January, 1900, when you were elected a director?

A. Yes sir, I was there.

Q. Didn't you go at that time down to those mines?

A. No.

Q. Do you remember of being in Ft. Scott before that, investigating this matter?

A. Well no, I think I was there afterwards.

Q. Wasn't you there once before with Mr. Greer I think and Mr. Guss?

A. No, Mr. Greer and Mr. Guss, I wasn't with them when they went there.

Q. When you were there in January, 1900, you were in the office of the company, weren't you?

A. I was at that stockholders' meeting.

117 Q. You saw the books there?

A. Yes sir.

Q. You saw the opinion of Mr. Perry and Col. Richards about the legality of these leases, didn't you?

A. No, I don't think I did, I didn't go there to investigate that; I went there to attend that stockholders' meeting.

Q. Don't you know the matter was all discussed over there between yourself and myself and others?

A. In an indirect way, but I don't remember the details in that,

because I wasn't there—because we were already stockholders, and I wasn't there to investigate—I wasn't authorized by anyone to investigate.

Q. You were there representing the defendants in this case or the holders of the $250,000 of stock?

A. I was there to vote the stock, yes sir.

Q. And you had a proxy for that purpose?

A. Yes sir.

Q. And at that time you voted it for yourself and Mr. McNeal, didn't you?

A. And Mr. Nelson, yes sir. I am not certain about it, but I think that was the vote.

Q. Wasn't the question of the validity of these leases then discussed?

A. I don't remember about that Mr. Biddle, that might have been canvassed as to whether it was a good lease, etc., you might have suggested it and in all probability did.

Q. Don't you remember to have discussed the matter with me then just in this way, that these leases were obtained before the Curtis act was passed, and that under the laws of the Creek Nation these leases were absolutely correctly drawn and approved as
118 required by the laws of the Creek Nation, and that the laws of the United States authorized the Creek Nation to execute coal leases,—don't you remember we looked at the statutes of the United States?

A. I don't remember that, but I remember this, that I got this impression from you, that these companies were good valid companies, I got that impression, that we weren't there to play, but we were there because these stocks were worth something.

Q. Don't you remember that you and I discussed the Curtis act which provided that where an Indian tribe had granted a coal or mineral lease, that the Secretary of the Interior was authorized to give to each lessee a tract of land not to exceed 640 acres of land, don't you remember?

A. I don't remember that, but I know this, that I got that impression from the Curtis law, but we might have canvassed it there and I wouldn't say we didn't and it is quite likely we did, and I got that impression from the Curtis law that parties buying blanket leases or any kind of a lease that they were authorized to hold, that is where we had in good faith under the law, that we had the right to 640 acres. That was my impression of the law and I don't know where I got that, I believe we might have canvassed it there, I wouldn't trust my mind, it is likely we did.

Q. Of course that was no pretense at that time that we thought there was absolute legality, it was a question very largely, and we thought it was valid?

A. I don't know whether I got that from you or Mr. Nelson, that where there were vested rights, that the department would not disturb them.

Q. Don't you remember we spoke of the amount of money that had been used in going all over this Territory and sinking
119 little holes to find out where the coal was an- opening mines, also in building this railroad line for eleven miles?

A. No, I don't; I might have said that because I was there on the other propositions, I never consulted with you, that you people build that railroad, because I was associated with the other party, with Mr. Brown, who built that railroad, by virtue of the fact that he furnished the money, and it was sustained in the district court at Vinita, to which these people were parties, and I never got that idea from you or anybody else that Mr. Nelson had built this railroad.

Q. At that time don't you remember that it was stated that that railroad was built because of the permission granted by the laws of the Creek Nation to parties who had coal leases on the land, to get an outlet for the coal?

A. Yes sir, I understood that that railroad was built by Ed. Brown, by virtue of the permit that these coal lessees had, that is, some of them; I didn't pay any attention to which ones, were authorized to build the lines to the nearest railroad for an outlet, and by that means Ed. Brown has furnished the money to build this railroad under the authority supposed to be given him by reason of coal leases, and that stood that way in there, that Brown furnished the money and did the work and the coal company hadn't done anything, and of course I ascertained that at the time I was up there.

Q. But that was before you brought this last suit?

A. No, I brought this last suit for this company against Brown prior to that stockholders' meeting, because I got home after I filed the papers and sold this stock after that and bought it five or six weeks afterwards. That is my recollection.

Q. Do you know whether the coal company here received any royalties in January, February, March and April, 1900?

120 A. No, there was no royalties received, never had been a dollar's worth paid when this deal was made.

Q. Then there was no royalties paid in the organization perfected on January 2, 1900, until this contract was made?

A. No.

By Mr. HORNOR: You were asked something about the payment of royalties,—you may state to what company you referred when you were asked about the payment of royalties?

A. The Tulsa Company.

Q. Do you know when this order of the Secretary was made changing the rate from ten cents to eight cents?

A. I do not.

Q. Do you know in reference to the time this contract was made when it was, before or after?

A. I do not. I will just state here—well, I don't know that either—that is just an impression I got, no, I don't know.

Q. You were interested in some of this stock yourself, weren't you?

A. Yes sir.
Q. When you went up there——
A. That is, you mean the original stock ?
Q. Yes sir.
A. Yes sir.
Q. When you went up there, did you go as an attorney at law for these people or as an attorney in fact ?
A. As an attorney in fact.

J. W. McNeal being recalled for further cross-examination.

By Mr. Biddle :

Q. You went to Washington in March ?
A. I started the last of February.
121 Q. What day did you start ?
A. I think the 27th of February when I started.
Q. When did you return ?
A. I think the 22nd day of March.
Q. Did you take any of these leases with you ?
A. Well, I might have had one as a sample to see if it was possible to do anything with the Secretary of the Interior.
Q. You went down there for that purpose ?
A. No, I didn't go especially for that purpose, I went to attend the inaugural.
Q. You went to the Secretary with one of these leases ?
A. I didn't go because the person with whom I consulted said it would be absolutely useless.
Q. You intended to call on the Secretary ?
A. Yes sir, to get this ratified or recognized, anyway.
Q. That was after the 4th of March ?
A. No.
Q. Well, was that after the 4th of March that you went down there—was at Washington ?
A. I got there the second day of March. I didn't try after the 4th day of March to do anything.
Q. Well, you made no communication with your people here as to anything of that kind while you were there, did you ?
A. I don't think I communicated with them, I had nothing to communicate.
My Mr. De Bois : Isn't it a fact Mr. McNeal that for four months before that you had been trying to get this matter through at Washington, and see whether or not these leases would be respected or they could be protected there ?
A. Yes sir, I had been by correspondence.

Objected to—overruled.

121½ JOHN D. DE BOIS, recalled by the defendants.

By Mr. HORNOR:

Q. There was a question asked this forenoon, whether you were acting at attorney for these people in any way; state to what extent you acted as an attorney?

A. Why, I only acted as an attorney in the selling, that is in advising Mr. McNeal to sell the $250000 of stock which he held as collateral, which was the prior stock, and also I was associated with the party at Vinita in taking that $12,000 judgment for the sale of that railroad, which is another matter altogether. I didn't act as attorney for them in this deal in any way; it is where they especially employed me to go there and look after that suit over there, I went and looked after it, and then the selling of the stock they held as collateral.

By Mr. BIDDLE: That is the only way you were employed as attorney?

A. Yes sir. I wasn't employed generally, just specially.

U. C. GUSS, one of the defendants, being called and sworn in his own behalf, testified as follows:

Direct examination by Mr. DE BOIS:

Q. You are one of the parties defendant in this action?

A. Yes sir.

Q. Will you state what was done any time before the 4th day of March toward notifying Mr. Nelson that this contract would not be considered by these men, and that he could have his books, stocks, etc.?

Objected to——

Q. Just state if you did anything before the 4th day of March to advise Mr. Nelson that you wouldn't pay him the $4500, but would return him the stock?

A. We did

122 Q. What was done, Mr. Guss?

Objected to, which objection was by the court overruled, to which the plaintiff excepted.

A. We had a meeting in the Bank of Indian Territory——

Objected to, unless communicated to Mr. Nelson——

By the COURT: You are too rapid with your objection—proceed Mr. Guss.

A. We held a meeting at the Bank of Indian Territory and decided that we wouldn't pay the $4500.00, but would surrender the stock to Mr. Nelson. There was present at that meeting Mr. Greer, Mr. Gray, Mr. De Bois and myself, I believe was all——

Objected to,—move to strike out the answer as incompetent hearsay and a self-serving unless communicated to Mr. Nelson.

A. (con.). I will get to that in a minute—at which time we instructed Mr. De Bois to notify Mr. Nelson to that effect, both by wire and by letter.

Q. Now then, do you remember about what time that was?

Move to strike out all the evidence, except that they authorized Mr. De Bois to communicate with Mr. Nelson, but what they authorized him to say or do is not competent—which motion was by the court overruled, to which the plaintiff excepted.

Q. Where did you notify me to instruct Mr. Nelson the stock would be placed for him?

A. That the stock was at the Guthrie national bank for him or subject to his orders.

Q. Now, Mr. Guss, what do you know about the making of this contract with Mr. Nelson at the time he was down here?

A. I knew but very little about it; I was either away or busy at the time Mr. Nelson was here, and simply said to the rest of you to go and make it, and I would be a party to it.

123 Q. Now then, Mr. Guss, after this contract was closed, did you do anything toward opening up those other mines over there, or any of those leases?

Objected to as incompetent, self-serving and not binding on the plaintiff, which objection was by the court overruled, to which the plaintiff excepted.

A. Mr. McNeal, De Bois and myself made a trip over there for the purpose of investigating the possibility of opening up those coal leases and of advancing the interests in these leases that was in operation by Col. Brown.

Q. What did you do while over there?

A. We went over to Tulsa and went out to where this mine was in operation and found that Mr. Brown had just received a steam shovel outfit for the purpose of stripping the coal, and hadn't yet got it in operation. The mine was doing very little the day we were there. We went from there to Muscogee and interviewed the Indian agent there as to his allowing us to open up some of these other mines, and he very courteously told us that we couldn't do it, and if we undertook it he would have us arrested for it.

Q. Did you also meet Mr. Soper?

A. Yes sir, we met Mr. Soper at Vinita and he informed us that our trip to see the Indian agent there was useless, and that it couldn't be done.

Q. I will ask you as secretary of these companies, did you demand of the Indian agent there, as to the amount of royalty that they had paid or any of them had paid into the treasurer?

A. After my return to Guthrie I wrote him a letter and asked

him to give me a statement showing the amounts of royalty paid on this mine that was in operation.

Q. Did he furnish you a list of them?

124 A. He did.

Q. Have you got it?

A. I delivered that to you.

Q. Examine this envelope?

A. After my request for the statement, he furnished me with this statement.

Q. And the letter accompanying it?

A. Yes sir, and the letter accompanying it.

Here the same are marked Exhibits M, M 1 and M 2, and offered in evidence by the defendants, and there being no objections to the same, they are as follows:

EXHIBIT "M."

Tulsa Coal & Mining Co.

1898.	Output in tons.		
Oct.	33	@ 10c	$3.30
Nov.	982		98.20
Dec.	1820		182.00
1899.			
Jan.	1521		152.10
Febr'y.	1447		144.70
Mar.	1354		135.40
April.	972		97.20
May.	399		39.90
June.	764		76.40
July.	966		96.60
Aug.	1138.03		113.80
Sept.	1042	Strip pits near Dawson	104.20
Oct.	254		25.40
Nov.	2233		223.30
"	107		10.70
Dec.	4581		458.10
"	140		14.00
1900.			
Jan.	2740		274.00
Febr'y.	3015		301.50
March.	5661	@ 8c	452.88
April.	3678.94		294.31
May.	2322		185.76

Exhibit M 1 being the envelope in which said exhibits were forwarded to defendants, is not with the exhibits kept by the reporter, and cannot be found.

125 EXHIBIT M 2.

Department of the Interior, United States Indian Service, Union Agency.

MUSCOGEE, INDIAN TERRITORY, August 10, 1900.

Bank of Indian Territory, Guthrie, Oklahoma.

SIRS: Replying to your communication of the 10th instant, wherein you ask for a statement showing the number of tons of coal mined by E. H. Brown since he began to operate near Dawson, Indian Territory, I have to say that enclosed you will find the statement as requested.

Very respectfully, J. BLAIR SHOENFELT,
U. S. Indian Agent.

C. J. O. (Inclosure.)

By the COURT: I would like to ask a question for information. What is the present status of this Tulsa mine, did this company, this Tulsa Company in which McNeal and these others have stock, take out a lease from the Secretary of the Interior to preserve their rights there or has it been abandoned or what is the status of it?

By Mr. MCNEAL: As far as I know it has been abandoned; the Missouri, Kansas & Texas Coal Company has stopped working some three or four months ago.

Q. Did your people ever apply to take out a lease under this 1898 act?

A. No sir, not that I know of,—this 640 acre provision?

126 Q. Yes sir.

A. Not as I know of. During the time from May until March 4 we didn't make any attempt to do that, we attempted to get another lease on that, that was our purpose.

Cross examination by Mr. BIDDLE:

Q. Do you remember of being in Ft. Scott in 1899 with Mr. Greer and in the office of these companies, C. C. Nelson's Company's office?

A. I don't remember as to the date, but I was there about that time with Mr. Greer.

Q. You remember these questions of the legality of these leases was discussed at that time?

A. Yes sir, they were being discussed.

Q. That is why you were there, wasn't it?

A. Not as to the question of legality, I am not a lawyer, I wouldn't go into that question, hardly. We were interested in a one-fourth interest, I believe, in these coal leases; I was one of six who were interested in that.

Q. That is the $250,000 stock?

A. Yes sir, and Mr. Greer and I had some business away and we came around by Ft. Scott to look into the matter; that was prior to the foreclosure and sale of that railroad.

Q. Do you remember what date that sale took place?

A. No sir, I do not.

Q. Wasn't it in the summer of 1899, or fall?

A. I don't know, the records will have to show that, I wouldn't attempt to say when it was. But we were at Ft. Scott before that foreclosure, and we were over there for the purpose of looking into this and seeing what could be done, if anything, towards the collection of the money for which this stock was up as collateral at that time.

127 Q. And you were there and saw what the value of the stock was and what the condition of it was?

A. Yes sir, as to this 25 % we did.

Q. And that is why you entered the coal companies' office?

A. Yes sir.

Q. The books were there on the table at that time, were they not?

A. Yes sir.

Q. And these leases you examined?

A. Well, I don't know that I examined those leases.

Q. You discussed the question there?

A. Oh yes, the question was talked over there.

Q. Do you remember the opinion of any attorney, that you now have, was then handed you?

A. Yes sir, there was an opinion I believe of yourself——

Q. Not at that time, was there?

A. This is Mr. Biddle?

Q. Yes sir.

A. I don't remember as to names.

Q. It seems to me I made the opinion afterward,—don't you remember the opinion of Mr. Berry?

A. I don't remember who the names were, I know there was an opinion there of at least one if not two lawyers about it, and Mr. Nelson told me who those gentlemen were; they were strangers to me outside of he said who they were or what they were.

Q. It was a very serious question as to whether those leases would be upheld by the department?

A. Yes sir, it was a question as to whether the company had vested rights there under those leases or not.

Q. Now, on that trip, did you visit the Tulsa mine?

A. No sir.

Q. When did you first visit that mine?

128 A. This one time I referred to a while ago, when Mr. McNeal and De Bois and I went there.

Q. Was that before this contract was made?

A. No sir, afterward.

Q. Didn't you visit it before this contract was made?

A. No sir, I never was there but that one time.

Q. As I understand it, immediately after you made this contract in May, 1900, you began to receive an income from that mine,—do you know in what way and what plan you adopted and carried out in order to get that income paid to the treasurer of your company?

A. Mr. McNeal attended to that, and all I know is what he told me.

Q. Did you know up to that time there had been any income paid to the treasurer?

A. Well, I don't know.

Q. You had never received any dividends on that $250,000 stock you had?

A. No sir.

Q. Do you know how it come that Mr. McNeal negotiated for the purpose of getting that income paid?

A. Only what he told me.

Q. Wasn't it Col. Brown,—through Col. Brown?

A. He told me he got it through Mr. Hobart, of the Kansas & Texas Coal Company, he told me that, and I have all reason to believe that that is true.

Q. Do you know that Mr. McNeal went to Washington in March, 1901, for the purpose of seeing whether these leases were valid or not, whether he could get the department to do anything?

A. No sir, I knew Mr. McNeal left town, and I understood that he went to the inauguration of the new President.

129 Q. Do you know of his taking these leases with him?

A. No sir, I didn't know that he took them along until he testified so.

Q. After he come back, did he talk to you about whether the department would do anything with these leases or not?

A. I don't know that he did after he came back; he said to me at one time he had given up all hopes of having it ratified or being any good, I don't know just when he talked that, we talked about it a number of times, whether it could be done.

Q. Now, as I understand you, the Indian agent over there has never in any way prevented you from working that Tulsa mine?

A. Not as I know of, no sir.

Q. Nor from working other of the other mines except the conversation you had?

A. He told us that we couldn't.

Q. Well, you did though.

A. No sir.

Q. Didn't you go to the Concharty mine and open it up?

A. No sir, we stayed away from it.

Q. Somebody else opened it up and it is a very valuable concern, isn't it?

Objected to as immaterial, which objection was by the court sustained.

W. H. GRAY, one of the defendants, being called and sworn as a witness in his own behalf, testified as follows:

Direct examination by Mr. DE BOIS:

Q. You are one of the parties defendant in this case, to this contract, are you?

A. Yes sir.

Q. Do you remember meeting Mr. Nelson at the time that this contract was made?

130 A. Yes sir.

Q. Just state to the court what was said and done at the time that contract was made.

A. The trade was made in the office of the Guthrie national bank; Mr. McNeal, Mr. De Bois and Mr. Nelson were present; they called me down there and the matter was explained; they called me down to the office and talked over this coal matter, and over the purchase of the coal stock, and on the statement of Mr. Nelson I agreed to go in with the rest of them on that option.

Q. What was Mr. Nelson's statement, Mr. Gray?

A. Mr. Nelson made statements there that looked to us if we could get our leases through, ratified, there would be something in it for us, sufficient, at least, I thought to justify me to put in my little $125 in the option. That Mr. Brown wasn't realizing for the company what the mine ought to turn out, and my recollection is he stated that the mine ought to turn out or was turning out in the neighborhood of twenty cars a day. This was the general conversation that was in the office.

Q. Which mine, Mr. Gray?

A. The Tulsa mine.

Q. What did he say as to the other mines?

A. Well, in regard to the other mines, I remember the question was asked, if the royalty was paid up, if we were safe, if the leases were good, but my recollection his statements that at that time it was that they were all in force.

Q. Did he say anything about them having opened up a mine at each place for the purpose of carrying out the terms of the law?

A. Well, no, I can't say except I think something was on a blue print they had there, that there was some holes here and there.

131 Q. Did he say anything about coal having been taken out, do you remember, at each place?

A. I don't know, I don't remember that.

Q. What did you do afterwards toward terminating this contract before the 4th of March?

A. As far as I was concerned, I remember drawing your attention to the fact that the time was about up, and we had better return the stock, and we had a meeting in the office room of the Bank of Indian Territory and concluded that the better thing to do was to return

the stock and notify Mr. Nelson that the stock was here subject to his order or something to that effect.

Q. Where did they come to that conclusion, where did you have that meeting?

A. In the office room of the Bank of Indian Territory.

Q. Do you remember when that was?

A. That was along about the last of February, is my recollection, 1901, or maybe a little bit later than that, the first of March, I remember the time that we were there.

Q. Do you remember any of the steps being taken or any of the instructions—do you remember any of the instructions as to how Mr. Nelson should be notified?

A. Yes sir, we instructed you to write Mr. Nelson that we would not pay any more money.

Q. Where was Mr. McNeal at that time?

A. McNeal was reported to me to be in Washington.

Q. I will ask you how much did you understand Mr. Nelson represented was being taken out of the Tulsa mine, per day, how many cars?

Objected to as a repetition——

Q. I will ask you for the purpose of refreshing your memory, was it tons or cars?

A. It was cars.

132 Q. About how many cars a day?

A. Twenty cars was my recollection.

Cross-examination by Mr. BIDDLE:

Q. At that time your office was on this street, wasn't it?

A. Yes sir.

Q. Do you remember of Mr. Nelson coming up to your office that day the day the contract was made, and talking to you about the sale of the stock?

A. No, I can't bring it to mind right now; I can remember the circumstance of meeting Mr. Nelson up in the upper story of the building at one time, but I don't recollect just the year it was nor the time it was.

Q. Wasn't it the time you made this contract?

A. I don't remember anything about that.

Q. Do you remember at that time of his offering $5000 for the 250,000 shares that you people owned?

A. No sir, he would have got mine awful quick if he had.

Q. You don't remember that?

A. No sir.

Q. You were asked in reference to Mr. Nelson's stating about opening and having expended money on each of these leases, do you remember of seeing that paper or a copy of it at that time?

A. I have no knowledge, Mr. Biddle of ever seeing that, I may have.

Q. It may have been there and you not seen it?
A. It might have been there and I might have looked at it.
Q. Were you actively engaged there or was the matter more in Mr. McNeal's hands?
A. It was a little more in Mr. McNeal's hands.
Q. He was the active person in that negotiation?
A. Yes sir.

133 F. H. GREER, one of the defendants, being called and sworn in his own behalf, testified as follows:

Direct examination by Mr. DE BOIS:

Q. What is your name?
A. Frank H. Greer, Guthrie, Oklahoma.
Q. You are also one of the parties defendant in this suit, are you?
A. Yes sir.
Q. Do you remember of meeting Mr. Nelson at the town of Guthrie at the time that contract was made in regard to the purchase of this stock?
A. Yes sir.
Q. State to the court what was said and done at the time by Mr. Nelson?
A. Mr. Nelson came down for the purpose of talking to us about selling us enough stock to give us a controlling interest. We held a meeting in the Guthrie national bank; there was present myself, Mr. McNeal, Mr. De Bois, Mr. Spurlock, Mr. Gray, and Mr. Guss was there at the opening but went away afterwards. The matter was thoroughly discussed and he showedu s a blue print where he had coal scattered all over that country, and he said there had been actual diggin-s of coal there, and the evidence was on file with the Secretary of the Interior, and the leases had all been approved, and that not only one lease was being worked, but he thought that we could work all of them. He represented they were taking out about 20 cars a day out of the Tulsa mine, which was being mined through the Kansas & Texas Coal Company. He thought that if the Kansas & Texas Coal Company had properly worked it they might dig double that amount out of the Tulsa mine; they were delaying the digging to get a sale of other coal which they owned. We
134 finally agreed on the purchase of an option upon the number of shares he controlled, he agreed to deliver to us to make us about 75% of the stock, including the $250,000 we already owned. We entered into there the optional contract, paid $500 cash and we carried the option to March 4th, 1901, I think was the date. If the balance of $4500 wasn't paid at that time, the contract——

Objected to as not the best evidence, which objection was by the court sustained.

Q. Now then, I will ask you whether or not you relied upon these statements at the time this contract was made?

Objected to as leading and suggestive, which objection was by the court overruled.

A. Yes sir, I relied on them absolutely, I didn't know anything about it at all, and I had to rely on his statements.

Q. Now, Mr. Greer, state what you did, if anything toward notifying Mr. Nelson as to the termination of this contract before the 4th of March?

Objected to as a repitition—overruled.

A. My recollection is the first meeting we held was held in the Guthrie national bank, we instructed Mr. McNeal to write to Mr. Nelson telling him the stock was there subject to his order; that we refused to carry out the option, and would return the stock; of course we never counted on anything more than returning it right here, because the delivery was made here, and naturally the return would be made here.

Objected to as argumentative, which objection was by the court sustained, to which the defendants excepted.

Cross-examination by Mr. BIDDLE:

Q. What statement did Mr. Nelson make to you which you relied on, which induced you to enter into this contract?

135 A. Well, the chief statement he made was that the leases were good; that they had been ratified by the Secretary of the Interior and any of them could be worked besides the one already worked, that is the one I relied on most.

Q. Didn't you look at the leases on that day, wasn't the lease right before you?

A. Yes, they had the lease there.

Q. Didn't you say who endorsed them, and who ratified them?

A. Yes sir, they were ratified by the Secretary of the Interior on the face of them.

Q. You saw how they were ratified?

A. Yes sir, but there was certain things to be complied with in the meantime——

Q. You didn't depend on what Mr. Nelson said, you depended on what you saw on that lease?

A. We depended on what he said as to whether the stipulations of the leases had been carried out, he said all of them had been carried out; I believe there is one stipulation there that you had to go and work each mine every year, and he said they had been, that the holes were three or four years old, all of them.

Q. When did you first see that hadn't been done?

A. We went over in the Indian Territory and investigated for myself, as far as that is concerned.

Q. You relied on this matter, that the contract hadn't been complied with with the Creek Nation, that is what I understand you to say?

A. I relied on his statements that everything stipulated in that lease had been carried out.

Q. Did you see them at that time?

A. I don't know that I read them, I think his statement about that was a verbal matter, I don't think he showed them to me.

136 Q. Don't you know there was a copy of this right among the papers?

A. There might have been, but I relied largely on his personal statements, I thought he was an honorable man and dealt with him as such.

Q. You relied on his personal statement more than you did on the endorsement on that, did you?

A. No sir, I don't know as I did as to that——

Q. You relied on his statement more than you did on the endorsement on that lease?

A. As to the details I did, yes sir, as to the fact of his having a lease, of course the lease was there.

Q. What information have you ever obtained that the conditions of the lease weren't complied with at that time?

A. Personally, before it came to a final payment, I went over and made a personal investigation.

Q. What final payment?

A. In other words, I told the gentlemen associated with me as far as I was concerned, I wanted to make a personal investigation before we closed the option.

Q. What final payment was to be made?

A. $4500.00.

Q. Oh, no, what payment was necessary to be made in order to preserve these leases which wasn't made previous to the execution of this contract?

A. One of the main things they should have done was to work the mines every year.

Q. You are talking about a payment that was to be made?

A. I am not talking about payment, I am talking about his verbal statements that all of the details required in this lease had been carried out, such as going on the lease every year and taking out coal, and saying that you are in actual possession and mining coal, etc.

137 Q. Now, where did you learn, where and from whom, that he hadn't dug every year?

A. I learned all over that country he hadn't.

Q. Where did you learn it?

A. You could learn from anybody down there.

Q. From whom did you learn it?

A. As far as I was concerned, I went all over.

Q. Do you know that all these things are not complied with now?

A. If they could be worked they would be worth a whole lot. They would be worth a large sum of money.

Q. And you were buying them on a basis of $500?

A. I was buying them on the representations that the leases there were valid.

Q. And you were putting up $500 and taking nine months to investigate?

A. Yes, sir.

144 Q. Do I understand that that is a fact?

A. Yes sir.

Q. And you wouldn't have bought them at all if Joe hadn't said those leases were legal?

A. I wouldn't have bought them any way in the world except on the optional contract.

Q. You wouldn't have bought them if Joe Nelson hadn't said those leases were legal?

A. I wouldn't have paid an option on them.

By Mr. HORNOR: He stated to you that everything had been done that was necessary to keep these leases in effect, didn't he?

A. Yes sir.

Q. Some of these gentlemen who furnished these legal opinions owned some of this stock, didn't they?

A. I don't believe I investigated that point. I remember Senator Baker's opinio: very distinctly, and I remember Joe bringing that up and he says there is something that absolutely ought to settle it.

By Mr. DE BOIS: You say you believe Mr. Nelson exhibited these papers to you, now, isn't it a fact that you never saw this lease until they were shipped down here to McNeal afterwards, isn't that a fact, that Mr. Nelson didn't have them with him?

A. I think I saw this lease at Ft. Scott, Kansas.

Q. You didn't see that when Nelson was down here?

A. I don't believe I did, I don't know either about that, no, I don't believe so, unless it was when he brought them down to deliver them, that is about when I saw that.

By Mr. HORNOR: You spoke about an endorsement, on the

145 lease, look and see if that is the endorsement you had in mind?

A. Yes sir, that is the endorsement. I know I looked this over at Ft. Scott, and I think we looked that over at Guthrie, but I don't know when it was, when they were delivered, I think possibly it must have been when Mr. Nelson was down here; he had a lot of documents with him, and my recollection is these were among them, but I remember examining them at Ft. Scott.

Q. This is the endorsement by the chief of the Creeks, over there?

A. Yes sir.

Q. You spoke about an endorsement, as I understood you, of the Secretary?

A. Well, I believe he told me that he had filed certain things down

there that had been approved by the Secretary of the Interior; I don't know whether he showed any documents to that effect or not, but I know he told me that.

By Mr. BIDDLE: Do you remember of consulting with Mr. Guss and McNeal and others about sending for Joe Nelson to purchase this stock before he came down here?

A. Well, I think it was a proposition from him to us.

Q. Don't you remember of telegraphing him and telling him you would pay his expenses if he would come down here and buy that stock?

A. I don't think I had anything to do with that, my recollection is that I was notified that Joe wanted to sell that stock.

Q. Didn't you assist in paying his expenses here?

A. I don't know, I might have done so, I don't know how that was.

Q. Don't you remember that Mr. McNeal telegraphed him, said he would pay his expenses if he would bring that down?

A. I remember, since you spoke of that, that he wanted us to come to Ft. Scott, and I couldn't go, I said I couldn't go, and
146 I think we all agreed, it being impossible for us to go to Ft. Scott, that we would pay his expenses if he would come here.

Q. And he was telegraphed to come?

A. Yes sir.

Q. You had been negotiating and writing back and forth about the sale of that stock or buying some more for quite a number of months?

A. I wanted to sell my stock to him in the first place.

Q. But you had been writing back and forth for several months?

A. What we stopped in Ft. Scott for was to sell my stock to him, but he persuaded me it was a good thing or something of that kind.

Q. Just to refresh your recollection, I will call your attention to a letter of Mr. McNeal of June 27, 1899. I will ask you whether that letter or its contents refreshes your recollection as to what you and your associates here were doing in the matter?

A. I don't believe I know anything about that letter at all; I think probably Mr. McNeal may have consulted with me about it; I don't remember anything about it now, about this letter. I know we had a general talk about Mr. Nelson going to sell it and about us going to Ft. Scott or him coming here, and since you asked me the question, I know we all chipped in and paid his expenses down here.

By Mr. HORNOR: After refreshing your recollection and looking at this lease, do you wish to be understood,—do you know that the Secretary had endorsed his approval on that lease or not?

A. No, there is no endorsement on here since I come to think about it; I think we took his statement verbally about that; I don't think we saw any documents, I know we didn't, and I think he told us we could get certified copies of something of that kind, I think we just stood on his word on that proposition.

147 U. C. GUSS, being recalled by the defendants, testified as follows:

By Mr. HORNOR:

Q. As secretary of these companies, have you been at all times on and since the 4th day of March, willing and ready to turn over the books and seals and other property of these companies to your successor or any person properly authorized to receive them?

A. I have been.

Q. And are you now?

A. I am.

By the COURT: You have got them, have you?

A. Yes sir.

By Mr. BIDDLE: Did you ever keep any record of the proceedings of the board of directors since you have been secretary?

A. No sir, never had a meeting, I mean of this board of directors.

The defendants here offer in evidence the deposition of J. F. Wisdom, which is as follows:

J. FENTRESS WISDOM, being sworn, testified as follows:

By Mr. DE BOIS:

Q. What official position do you hold, in the Indian Territory, if any?

A. I am chief clerk in the office of the U. S. Indian agent, but at the present time, I am acting Indian agent.

Q. Is it the duty of that office to collect all the royalties due the Creek nation for leases under contract for mining coal?

A. Yes. Our office collects all royalties paid to the Creek nation.

Q. Have the following companies paid any royalties for the use of mining coal in the Indian Territory, to wit: The Tulsa Coal & Mining Co., the Wewoka Coal & Mining Co., the Gar Creek Coal &
Mining Co., the Red Fork Coal & Mining Co., the Buyaka
148 Coal & Mining Co., the Concharty Coal & Mining Co., the
Sapulpa Mining Co., Broken Arrow Coal & Mining Co., the Catoosa Coal & Mining Co, Choctaw Coal & Mining Co., of the Creek nation.

A. No, none of them have paid any royalties except the Tulsa Coal & Mining Co.

J. FENTRESS WISDOM.

149 "Ex. N," T. A. H.

Rules and regulations governing mineral leases, the collection and disbursement of revenues, and the supervision of schools in the Indian Territory under the general provisions of the act of Congress approved June 28, 1898 (30 Statutes, 495).

150 Rules and regulations prescribed by the Secretary of the Interior under the general provisions of the act of Congress approved June 28, 1898 (30 Stats., 495), to govern miscellaneous matters in the Indian Territory.

Under the general provisions of the act of June 28, 1898, (30 Stats., 495), the Secretary of the Interior is required to prescribe rules and regulations to govern the leasing of lands for mineral purposes, the collection of royalties, rents, and other revenues of the nations within said Territory, and the disbursement of moneys belonging to such nations; therefore the following rules and regulations shall apply in all cases not provided for by specific agreements heretofore ratified by Congress and the nations interested, or that may be hereafter ratified by such nations, and regulations heretofore or hereafter prescribed under such agreements:

Mineral Leases.

1. That leases under section 13 of the said act shall be entered into with the Secretary of the Interior and on blank forms prescribed by him, and no lease otherwise made shall be valid or have any effect whatever to vest in the lessee any right or interest either at law or in equity.

2. All such leases shall be in quadruplicate, and shall contain a clear and full description by legal subdivisions of the tract or tracts of land covered thereby, not to exceed six hundred and forty acres, which legal subdivisions must be contiguous to each other.

3. Minimum royalties shall be required of all lessees as follows, the right being reserved, however, by the Secretary of the Interior in special cases to either reduce or advance the royalty on
151 coal, asphalt, or other minerals, on the presentation of facts which, in his opinion, make it to the interest of the nation of Indians within which such coal, asphalt, or other minerals may be located, but such advancement or reduction of royalty in a particular case shall not operate in any way to modify the general provisions of these regulations fixing the minimum royalty as herein provided, viz:

(*a*.) On coal, fifteen cents per ton for each and every ton of coal produced weighing two thousand pounds.

(*b*.) On asphalt, sixty cents per ton for each and every ton produced weighing two thousand pounds.

(c.) On gilsonite, elaterite, and other like mineral substances royalty shall be fixed according to the comparative market v of the same to the value of asphalt.

(d.) On oil, ten per centum of the value of all oil produced royalty to be ascertained on the value of the oil in its crude sta

(e.) On all other minerals—such as gold, silver, iron, and like—as follows, sampling charges to be first deducted: On al smelter returns of ore of fifty dollars ($50) per ton and un royalty of ten (10) per cent.; on all net smelter returns of ore fifty dollars ($50) per ton and less than one hundred and fift lars ($150) per ton, a royalty of fifteen (15) per cent.; on a smelter returns of ore over one hundred and fifty dollars ($15 ton and less than three hundred dollars ($300) per ton, a roya twenty (20) per cent., and on all net smelter returns of or three hundred dollars ($300) per ton, a royalty of twenty-fiv per cent.: Provided, that all lessees shall be required to p vanced royalties, as provided in said section 13, on all mi claims, whether developed or not, subject to all the conditi said section imposed.

152 4. That all lessees of sand or gravel deposits shall quired to pay a royalty of not less than two cents per yard for all such material removed, to be measured as the san lie in the original deposit, and for this purpose the lessee shall removal cause such levels or bench marks to be established out as may be necessary to provide for the proper measure the quantity removed after the same has been excavated. A lessees of stone quarries shall be required to pay a royalty o ite of not less than ten cents per cubic yard for all stone q measured by run of quarry, and on all stone other than gra royalty shall be proportionate to the comparative value of su with the value of granite as may be agreed upon.

5. All lessees of oil, coal, asphalt, or other minerals on la ted, sold, or reserved shall be required, before the commen of operations, to pay to the individual owner the value of th the necessary surface for prospecting and mining, including way for necessary railways and the damage done to the la improvements; and in case of disagreement, for the purpo certaining the fair value of the use of the land and the actu age done, the owner of the land and the lessees shall each arbitrator, who, together with such person as shall be appo designated by the Secretary of the Interior, shall constitute to consider and determine the amount that shall be pai lessee on account of the use of the land and damage done, award of such board shall be final and conclusive, unless th be impeached for fraud. All timber and other materials the lessee from land allotted, sold, or reserved for use in the of buildings upon the leased tract, and in the mine or mi ated thereon, as for shoring levels in coal mine

153 forth, shall be paid for by the lessee according to rates.

6. That the owners or holders of leases which have been assented to by act of Congress shall be required within six months from the date of these rules and regulations to enter into leases with the Secretary of the Interior, under the provisions of section 13 of said act of June 28, 1898, and said leases shall be subject to all the provisions of these rules and regulations, and any others that may hereafter be made by the Secretary of the Interior under the provisions of said section of said act.

7. Corporations, persons, or companies who, under the customs and laws existing and prevailing in the Indian Territory prior to the said act of June 28, 1898, have made leases of different groups or parcels of oil, coal, asphalt, or other mineral deposits, and have taken possession thereunder, and, by themselves or their assigns, have made improvements for the development of the same, which have resulted in the production of oil, coal, asphalt, or other minerals in commercial quantities, shall, if in possession, be given preference in the making of leases of said groups of oil, coal, asphalt, or other mineral deposits under said section 13 of the act of June 28, 1898. And all persons in possession of oil, coal, asphalt, or other mineral deposits who have made improvements thereon shall be given preference in the making of leases or the renewal of leases for such deposits: Provided, That the failure of the party or parties in possession of any group or parcel of oil, coal, asphalt, or other mineral deposits, for the period of six months after the date of these regulations, to apply for a lease of such deposits, and in case of the renewal of a lease, their failure for the period of sixty days from the expiration of his or their lease to apply for such renewal, shall be held to be a
154 relinquishment of his or their preference right to such lease and to such renewal of lease.

In the event of a controversy arising between two or more applicants for the lease of any tract or tracts of land for mining, and either of said applicants claims to be in possession of the land, which claim is denied, no lease will be given of such land until the question of possession shall have been investigated by such officer of the Interior Department as shall be designated by the Secretary of the Interior and the right of possession shall have been determined by the Secretary of the Interior.

8. All lessees will be required to keep a full and correct account of all their operations under leases entered into under these regulations and said section 13, and their books shall be open at all times to the examination of such officers of the Interior Department as shall be instructed in writing either by the Secretary of the Interior or the Commissioner of Indian Affairs to make such examination.

9. All lessees under said section 13 will be required to give bond with two good and sufficient sureties, or an approved surety company, for the faithful discharge of their obligations under their leases, in such penalty as shall be prescribed in each case by the Secretary of the Interior, and until such bond is approved by the

Secretary of the Interior no right under the lease shall accrue t
lessee.

10. Applications for mining leases under the provisions of
section 13 should be duly verified by the applicants and addr
to the Secretary of the Interior, and they shall be filed with
United States Indian inspector located in the Indian Territory,
will forward the same to the Commissioner of Indian Affairs,
his report and recommendation as to whether the same sh
155 be allowed or rejected, and the Commissioner of Indian
fairs will, in like manner, transmit such applications t
Secretary of the Interior with his recommendation.

Every application should be accompanied by a duly cer
check upon the United States depository at St. Louis, Missou
upon some solvent national bank in the United States, for one
dred dollars, payable to the order of the United States Indian
at the Union agency, Indian Territory, in payment of adv
royalty on lease for one year, and in addition, if the applicat
allowed, the applicant will be required to pay the cost of exe
the lease, including the war-revenue stamps required by law.

11. An application for a mining lease under said section 1
by an association of individuals, must give the name of all
members and be verified by the principal officer thereof, an
incorporated company applying for a mining lease under sa
tion must also file with its application—

(*a.*) A copy of its articles of incorporation duly certified
proper officer of the company under its corporate seal, or
secretary of the State or Territory where organized.

(*b.*) A copy of the State or territorial law under which th
pany was organized, with the certificate of the governor or se
of the State or Territory that the same is the existing law.

(*c.*) When said law directs that the articles of association
papers connected with the organization be filed with any
territorial officer, the certificate of such officer that the sam
been filed according to law, with the date of the filing there

156 Royalties, Rents, etc.

12. All royalties accruing under leases entered into for
purposes under these regulations, including advanced royal
vided for in section 3 above, in accordance with said secti
the act of June 28, 1898, shall be payable in lawful mone
United States or exchange issued by a national bank in the
States, to the United States Indian agent at the Union ag
the Indian Territory, who shall be at all times under the
and supervision of the United States Indian inspector for th
Territory. Said advanced royalties shall be payable $10
making of the lease, $100 in one year thereafter, $200 in t
thereafter, and $200 in three years thereafter, and $500 on t
and each succeeding year until the end of the term ther

other royalties in accordance with the schedule provided in these regulations (unless modified in any particular case by the Secretary of the Interior, as hereinbefore provided), shall be payable to said United States Indian agent monthly, and shall be paid on or before the 25th day of the month succeeding the date when such monthly royalty shall have accrued. All such monthly royalties shall be accompanied by the sworn statement, in duplicate, by the person, corporation, or company paying the same, as to the output of the mine, oil well, or quarry of such person, corporation, or company for the month for which royalties may be tendered. One part of said sworn statement shall be filed with the United States Indian agent, to be transmitted to the Commissioner of Indian Affairs, and the other part thereof shall be filed with the United States Indian inspector located in the Indian Territory.

13. The said United States Indian agent shall receive and receipt for all royalties paid into his hands when accompanied by the
157 sworn statement as provided in the preceding regulation, but not otherwise, and it shall also be his duty to collect, under the supervision and direction of the United States Indian inspector for the Indian Territory, all rents, permits, revenues, and taxes, of whatsoever kind or nature, that may be due and payable to any Indian tribe or tribes to which these regulations may apply, as provided for by the laws of such tribe or tribes.

14. The rents and permits, taxes and revenues provided for by the foregoing regulation to be collected by the United States Indian agent shall be due and payable to him in lawful money of the United States at the time when such rents, permits, taxes, and revenues would, under the laws of the particular nation, have been due and payable to the authorities of such nation had not the act of June 28, 1898, and especially section 16 thereof, been passed.

15. All moneys collected by the United States Indian agent, as provided in these regulations, shall be, as soon as practicable, deposited by said agent with the Assistant Treasurer of the United States at St. Louis, Missouri, in the like manner as moneys known in the regulations of the Indian Office as "miscellaneous receipts, class III," are deposited, with a statement of the tribe or tribes to which said moneys belong, the proportionate share of each tribe, and the particular source from which the same is derived—*i. e.*, so much from mining leases, so much from rents, etc.

Disbursements.

16. The salaries of all officers of any tribe or nation in the Indian Territory to which these regulations are applicable, provided for by the laws of such tribe or nation, shall be paid by the United States Indian agent, under the supervision and direction of the United States Indian inspector for the Indian Territory, and upon authority specifically given therefor by the Secretary of the Interior
158 out of moneys in the hands of the Government of the United States subject to disbursement therefor under the direction,

A. Yes sir.

Q. How do you know it?

A. I know it, I say, by going over there and making an examination. No notice had ever been given at Muscogee that they were working any mines except at Tulsa. They hadn't filed any notice that they were going on there to work, as required by the laws, and I was told positively at Muscogee that the laws hadn't been complied with and that the Government didn't recognize the working of them.

Q. You saw the map, did you?

A. I saw the blue print.

Q. Did that indicate where he said he had dug?

A. It indicated where the coal was, he said he dug where there was coal, that there was coal there.

Q. Did you ever go to any place where he said on that map and find out whether he did or not, now just answer that question, did you ever go to any one point and place on that blue print, did you ever do it, except to Tulsa?

A. Yes sir.

Q. Where?

A. The Sapulpa mine.

Q. Where?

A. I put in a day and a half there.

138 Q. Where?

A. Right down on what is called the Sapulpa mine, not where it is marked on the map, but all over. There is no evidence of any mine over there at all.

Q. Did you go to any one point marked on that blue print to see whether coal was dug or not?

A. He didn't have any marks on the map to show where he dug coal.

Q. Do you say he didn't have a place on the blue print where he dug coal?

A. He said where the discovery had been made, and he said he had gone there and gave evidence of mines, of activity, as required by the laws of the Government governing the Indian Territory and as stipulated in the lease.

Q. In what respect did you find out he hadn't told the truth?

A. I found out personally on the Sapulpa lease.

Q. In what respect?

A. All respects, by going around over it and discovering whether there was any mines there.

Q. Did that forfeit the lease?

A. Yes sir, Mr. Wright told me that too.

Q. And is that what Wright told you?

A. Yes sir, and I went other places,—and his clerk told me that too. He said if anything of that sort had been done, they ought to have filed notices, and they would have retained vested rights.

Q. Don't you know that here is the receipts?

A. That may be, but over there he said he was going by the records of the coal leases, and he said if we would preserve our rights that we should have filed notices here.

Q. What other statement did he make that you relied on?

139 A. Well, I have told you that he stated all the details had been carried out. I relied on the statements that they were taking twenty cars a day out of the Tulsa mine, that was the chief thing I relied on because that was an important resource.

Q. Did you find out that was not true?

A. Yes sir, one day I went over there and investigated it personally.

Q. When did you go?

A. About two or three months afterwards.

Q. And they weren't taking out twenty car-loads a day?

A. No, they were taking about two or three car-loads a day.

Q. Did that prove to your mind that they hadn't been taking out that much?

A. Yes sir, I asked the men who had been working there for some time; we couldn't get any information from Mr. Brown's sons; the information we got was by going down and finding the men who loaded the coal on the cars. We went down and questioned these men, and I asked them how far back this average of two or three cars would go; I expect the average would be about two cars; some days they said they only shipped out one car, and I believe they said there was one time they remembered they shipped out as high as four cars; now that is the Tulsa mine, about three miles below Dawson. I went down there personally and investigated it.

Q. Now that is the information you got that you found out they hadn't been taking out twenty car-loads a day?

A. Yes sir.

Q. Now, didn't he say to you this, that they could take out twenty car-loads a day there if they would operate the mines as they should be?

140 A. No, we didn't question him about the capacity at all.

Q. Didn't you notice when you were there that if that mine was operated right, you could easily take out 20 car-loads a day?

A. I didn't examine into that.

Q. Wasn't your company controlling it at that time?

A. I was simply a stockholder, I wasn't an officer.

Q. You wasn't a director?

A. No sir.

Q. You knew when you bought this stock you wouldn't get any royalty from what had been taken out of it theretofore on this stock, didn't you?

A. Yes sir.

Q. So that it was only as to the amount that was taken out after that that would benefit you as a purchaser of this stock?

A. Yes sir.

Q. And you knew too very well that that stock had paid no royalties before to this company before that?

A. Prior to the time I——

Q. Prior to the time you made this contract?

A. That is before?

Q. Yes sir.

A. No sir, I don't think I ever drew a cent out of it as a stockholder.

Q. Don't you know that the company here never paid anything?

A. I knew that they were receiving no money, but that wasn't evidence that they weren't receiving it, because we didn't get it. As a matter of fact we discovered afterward they had been receiving it right straight along.

Q. Who had?

A. Brown and those fellows over there.

141 Q. What fellows besides Brown?

A. Well, Brown and the Kansas & Texas Coal Company—Brown leased it from the company.

Q. Now, you had $250,000 worth of stock, or were interested in it?

A. Yes sir.

Q. For about a year before that?

A. I think so.

Q. And you had never received a cent of it?

A. No sir, but they had been mining all the time.

Q. And as soon as you did receive this stock, you began getting two cents per ton?

A. They got it ,but we could never get hold of it.

Q. Isn't it a fact that that was really the bone of contention at the time Mr. Nelson came down here, that he couldn't do anything with Brown at all, that he thought if you could buy this, you could get a better hold on him and you could get something out of it?

A. I don't know anything about that, I think Brown claimed Nelson personally owed him, and he was keeping this money back to pay up the debt.

Q. And isn't it a fact that you thought if you people got hold of it you could manage it better than Brown could?

A. No, we thought we could manage the mine better.

Q. Do you remember of being at Ft. Scott in the summer of 1899 and coming to the company's office there?

A. Yes sir.

Q. With Mr. Guss?

A. I believe it was Mr. Guss, yes sir.

142 Q. And do you remember of having a talk there about the value of the stock and the condition of the charters and whether they were valid or not?

A. Yes sir.

Q. Do you remember of seeing any opinions of Mr. Perry or Col. Richards at that time?

A. Yes sir.

Q. Had I written any opinion?

A. I think you had written an opinion, I believe Mr. Nelson showed it to me; I know it was some lawyer of eminence, and he was largely basing his declarations of legality and everything on those lawyers' opinions.

Q. But don't you remember there was Mr. Perry who had been United States district attorney for eight years for the district of Kansas, giving his opinion?

A. I don't know, there probably might have been.

Q. Are you acquainted with Mr. Richards, the Missouri-Pacific attorney?

A. No, I think I saw the opinion of Mr. Biddle and probably Perry's opinion was there.

Q. You knew very well then it was a doubtful question as to whether these leases were valid?

A. I didn't know anything about it, I was taking the statement of Mr. Nelson.

Q. Whose opinion did you value most as to the legality of these leases, Mr. Perry's, my own, Mr. Nelson's or Mr. De Bois?

Objected to as incompetent and immaterial, which objection was by the court overruled, to which the defendants excepted.

A. The question is, did I rely primarily on the statement of Mr. Nelson. He backed up his statement by producing the opinion of yourself and I guess Mr. Perry and probably another lawyer, I remember there was several of them there, I remember yours
143 distinctly because they said you lived in town and that you were a reliable, creditable lawyer and praised you very highly and told me that your opinion was absolutely good. Now Mr. Perry I knew his reputation because he was a man of at least State reputation in Kansas, and he backed up his declarations by showing these statements on these leases, but of course it was his primary statement that led me into it at all.

Q. If he hadn't backed up his statements by these opinions by these attorneys, would you have believed it on that question of law?

Objected to as immaterial——

Q. Would you have relied on it?

A. I believe I would have relied on Mr. Nelson's statement; I had known him quite a while.

Q. You knew that was a legal question and you knew he wasn't a lawyer?

A. He told me he had gone all over the legal question that he had gone into the whole thing, and knew absolutely everything about it that he convinced himself that everything was all right, and it was on his declarations I put my money in.

Q. What did you think these leases would have been worth if there was no question as to their legality?

168 Department of the Interior Washington, D. C. Bond of —— —— lessee- of — in the —— Nation, Indian Territory, for mining purposes. Dated ——, 189–. Approved: —— ——, Secretary.

Affidavit of Surety.

(To be Used Only when Individual Sureties are Offered.)

—— OF ——, } ss:
County of ——, }

I, —— ——, one of the sureties on the prefixed bond of —— —— as — do depose and say that I am worth, in unincumbered property, over and above my debts, liabilities, and exemptions under the laws of the —— of — dollars and upward, as follows:

Real estate, valued at $—, situate in ——, and consisting of[1] — and personal estate, valued at $—, located in ——, and consisting of[2] —.

(Signature:) —— ——,
(Post-office address:) —— ——.

Sworn to and subscribed before me this — day of ——, 189–.
[SEAL.]
—— ——,
—— ——.

169 —— OF ——, } ss:
County of ——, }

I, —— ——, do hereby certify that —— —— who administered the above oath, was at the time of doing so a — in and for said —, duly qualified to act as such, and to administer oaths in such cases, and that I believe his signature, as above written is genuine.

In testimony whereof I have hereto set my hand and affixed the seal of — this — day of —— one thousand eight hundred and ninety —.

—— ——,
—— ——.

170 By Mr. DEBOIS: The defendant offers in evidence the rules and regulations of the Secretary of the Interior.

By Mr. BIDDLE: We have no objection. Inserted herein at preceding page, and marked Exhibit N.

The defendants rest.

J. T. NELSON, the plaintiff, being called and sworn in his own behalf, testified as follows:

Direct examination by Mr. BIDDLE:

Q. You were one of the charter members of these several coal companies mentioned here?

A. *No sir.*

Q. Were you connected with these companies shortly after they were chartered?

A. Yes sir.

Q. I believe under the laws of the Creek nation, that the Creek council adopt, that it is necessary in cases of that character, for members of the Creek tribe to be connected with the corporations isn't it?

Objected to as to the competency of the witness, which objection was by the court sustained.

Q. After you became connected with these ten companies, did you do anything toward carrying out the provisions in reference to working on each one of the leases?

A. Yes sir.

Q. I will call your attention to Exhibit "G" and ask you to state whether that is a report that you made?

A. Yes sir, it is.

Q. I will ask you to state whether the treasurer of the Creek nation signed that report at the bottom there?

171 A. He did.

Q. Does that statement, Exhibit "G" state the truth in reference to the amount expended on each one of those leases?

A. It does.

Q. Up until January 1, 1897?

A. Yes sir.

Q. Before Mr. Childers signed this, do you know if he investigated if this was a correct statement of the expenditures?

A. Yes sir.

Q. To what extent?

A. He came to Ft. Scott and went over the books.

Q. Where is his office?

A. His office at that time he was the treasurer of the Creek nation, at Okmulgee, but he lives near Wagoner.

Q. Who furnished the money to expend this $5197?

Objected to as assuming.

By Mr. HORNOR: I didn't know that was in evidence, and I move to strike it out as incompetent, irrelevant and immaterial.

By the COURT: It is not evidence of the fact that this amount has been spent, it is only evidence of the fact that he did certify to the treasurer that he had spent that amount, and the Indian treasurer had approved it.

By Mr. BIDDLE: You may state, Mr. Nelson, take this map and state to the court where you expended this money and what you did in expending it?

Objected to as assuming, which objection was by the court overruled.

A. We opened up and prospected on each one of the leases marked here on the map, the proper location marked on the map.

Q. I will ask you in what way you expended this $856 on the Tulsa mine, up to January 1, 1897,—what you did?

172 Objected to as assuming, which objection was by the court overruled, to which the defendants excepted.

A. We spent most of it in prospecting and opening up the mine—all of it in fact.

Q. State fully what did you do?

A. In stripping the coal and hauling it to Dawson before the switch was built, and building houses.

Q. How many houses did you build?

Objected to as immaterial and irrelevant, which objection was by the court overruled, to which the defendants excepted.

A. Three or four small houses.

Q. Near where the mine was afterwards fully opened?

A. In that locality, yes sir.

Q. Did you do anything on that lease in reference to sinking, boring small holes, prospect holes?

A. Yes sir.

Q. Where did you sink any holes, if any, on the Tulsa lease?

A. Oh all around where they are mining now, in a radius of two or three miles.

Q. Did you discover coal?

A. Yes sir.

Q. How deep did you sink those holes?

A. From twenty to thirty feet?

Q. Now, in what way did you spend the money of $789 on the Sapulpa lease?

A. Most of that money was spent there in hauling the coal to the railroad and opening up the mine.

Q. Where was that mine?

A. That was on Nickel creek.

Q. Is it at the place indicated on this map?

A. Yes sir.

173 Q. How far from the railroad?

A. About four miles.

Q. You may just indicate to the court where that work was done?

A. At this place here.

Q. What did you do with the coal?

A. Brought part of it to the Frisco railroad and sold it to them, and the balance of it was not worth shipping, and we gave it to the

people of Red Fork for unloading it, and thay unloaded three cars to my certain knowledge, and I think we shipped about ten or twelve cars from that mine.

Q. Now, did you sink any prospect holes on that mine?

A. Yes sir.

Q. To what extent?

A. We prospected that lease more than any other.

Q. To what extent?

A. Well, there were over three hundred prospect holes sunk in that lease.

Q. How deep did you go?

A. One of them was 680 feet, and the balance of them went back to the coal, as far as we could strip it.

Q. How deep did you go in them?

A. Oh, twenty feet.

Q. Now, in sinking the hole 680 feet, what coal if any, did you discover?

A. It was reported that we had a second vein.

Q. How deep?

A. About 608 feet.

Q. And what thickness was that coal?

A. It was said to be about six feet.

Q. By those who sunk the hole?

A. Yes sir.

174 Q. And you expended this amount of money on that?

A. Yes sir.

Q. Now, what did you do on the Choctaw Coal & Mining Co. lease in expending $275; just take it up and show the court where you did it.

A. We opened up these three places, at the mark on this Choctaw Coal & Mining Company.

Q. How did you do that?

A. By employing teams and scrapers and plows.

Q. Was that all you did on that lease?

A. We sold some of that coal in Holdenville.

Q. Did you sink any prospect holes on that lease?

A. Not deep ones; we dug those prospect holes to see the coal. We opened up where it cropped out. We would scrape off a bit and then go back and sink prospect holes probably fifteen or twenty feet perhaps, go down until you went through the vein of coal.

Q. Now on the Wewoka Coal & Mining Company, $265 show the court where that lease is?

A. Yes sir, this southern lease here, we opened up these four places.

Q. How did you do that?

A. In the same manner we did the other.

Q. With teams and horses?

A. Yes sir.

Q. Did you sink prospect holes on that?

A. Yes sir.

Q. How many?
A. I don't remember.
Q. A number?
A. Quite a number.
175 Q. Did you discover coal?
A. Yes sir.
Q. Did you discover coal in every prospect hole you sunk?
A. No sir.
Q. In about what proportion of them did you discover coal?
A. I don't remember, we largely followed back the croppings with a hole.
Q. That is in the ravines?
A. In the ravines, yes sir.
By the COURT: Did you take out any coal on that lease?
A. No sir.
By Mr. BIDDLE: You discovered coal on it?
A. Yes sir.
Q. Now, on the Concharty Coal & Mining Company, $618 where is that?
A. That is south of the Arkansas river, that included Okmulgee, it was on that lease, the capitol of the Creek Nation.
Q. What did you do with that?
A. We developed the coal around Okmulgee and marked some of it in Okmulgee.
Q. In what way did you do it?
A. Hauled it there and sold it.
Q. Did you open any mines?
A. Yes sir.
Q. How many?
A. Two.
Q. Did you sink any prospect holes?
A. Yes sir.
Q. How many?
A. I don't remember.
Q. Did you find coal in every prospect hole?
176 A. No sir.
Q. Now, in Broken Arrow Coal & Mining Company $385 where is that land?
A. On the north side of the Arkansas river.
Q. To what extent did you spend on that lease?
A. We found some good coal on that.
Q. Did you open any mines on that?
A. No, we didn't marked any coal.
Q. Now, the Nayuka Coal & Mining Company, $322, where is that lease?
A. Between the North fork and Deep fork of the North Canadian river.
Q. Did you open any mines on that?
A. Yes sir.

Q. How many?
A. We opened up four or five places there, more than that, a dozen of them.
Q. Did you sink any prospect holes there?
A. Yes sir, there is the best coal we found.
Q. In the Red Fork Coal & Mining Company, $598 what did you do on that?
A. Well, we opened up a great many places on that.
Q. Do you remember how many?
A. I don't remember, the plat here shows four.
Q. Do you remember whether you opened that many?
A. I know we opened that many, yes sir.
Q. How did you expend this money there?
A. By digging prospect holes and scraping the coal.
Q. Using teams, horses and scrapers?
A. Yes sir.
Q. Did you market any of that coal?
177 A. No sir.
Q. Now on the Gar Creek Coal & Mining Company $683 where is that?
A. That is between the Verdigris river and the Arkansas river.
Q. What did you do on that?
A. We opened up considerable coal there, about eighteen miles east of the M. K. & T. road.
Q. You mean west?
A. Yes sir, west of the M. K. & T. road.
Q. How many mines did you open on that lease?
A. Two.
Q. Did you market any coal from there?
A. No sir.
Q. Now did you in each prospecting and opening up of these mines, always ascertain the thickness of the vein and open to that extent?
A. Yes sir.
Q. You may state on which of these leases you found the thickest coal, that is surface coal?
A. On the lease south of Okmulgee, the Nuyaka lease.
Q. How thick was the coal?
A. Well, it would average four feet.
Q. On which of these leases did you find the best quality of coal?
A. I considered that was the best quality of coal.
Q. On which did you find the vein of coal that was of least thickness?
A. Well, I don't remember, they were about the same north of that, the further south you went the better the coal seemed to be.
Q. And the thicker the vein?
A. Yes sir.
178 Q. Well, it was deeper here, wasn't it?
A. No, it wasn't.

Q. About how thick was the thin-est vein that you struck?
A. About thirty-two inches.
Q. Did you at any other point except on the Sapulpa lease go below the surface vein?
A. No sir.
Q. If I understand you, you spent in cash $5197 in this work?
A. Yes sir.
Q. And this money was expended by these companies?
A. Yes sir.
Q. And before January 1, 1897?
A. Yes sir.
Q. Now, what railroad if any run through either of these leases in January 1897 or previous?
A. The Choctaw railroad run through two of them.
Q. Did it at that time?
A. Yes sir.
Q. What other railroad?
A. The Frisco ran to Sapulpa, across one lease, the Sapulpa lease, and across a point of the Tulsa lease.
Q. Were there any railroads up to January 1, 1897, that run south of the Frisco road and north of the Choctaw?
A. No sir.
Q. Or north and south through the Creek Nation?
A. Not prior to that date.
Q. Now, there has something been said here about grading a railroad, which of these companies, if either, had charge of the grading of that railroad?
A. The Sapulpa.
Q. From what point and to what point was that grade made?
179 A. From a point close to Red fork to Twin mounds.
Q. About what distance?
A. About eleven or twelve miles.
Q. Was that grade completed through that entire distance?
A. Yes sir.
Q. Or was there about a mile that was not entirely completed?
A. I think not.
Q. Was it completed ready for laying the ties?
A. Yes sir.
Q. Graded level?
A. Yes sir.
Q. When was that grade made?
A. I think in 1897, I don't remember.
Q. Mr. Nelson, I will call your attention to the work which you did on these different leases,—I will ask you to state whether you took receipts for the moneys you expended?
A. Yes sir.
Q. Did this account given here, Exhibit "G" include your own services?
A. No sir.

Q. Did you manage all of that work yourself?
A. For a time I did.
Q. Those receipts of actual cash that you paid out aggregated the amount states?
A. On the prospecting and developing the coal.
Q. Did you afterwards, after making that roadbed there purchase any ties for that roadbed?
A. No, I did not.
Q. Were there any ties purchased?
A. Yes sir.
180 Q. In what amount?
A. I think about thirty thousand.
Q. Were those ties delivered on the track there?
A. Some of them.

Objected to as incompetent, irrelevant and immaterial—which objection was by the court overruled, to which the defendants excepted.

Q. Now, calling your attention to the taking out and shipping of coal, at what mine did you first take out and ship coal?
A. From the Tulsa mine.
Q. When did you begin taking the coal from that mine?
A. In the summer of 1896?
Q. Where was it delivered?
A. It was delivered at Dawson, about three miles from the mine, on the Frisco railroad.
Q. Who superintended that work?
A. We let the contract to a man by the name of Dudley, Sherman Dudley.
Q. Was that coal weighed by anyone?
A. At that time it was, yes sir?
Q. By whom?
A. By the weigher at Dawson, we had scales there.
Q. I mean who had charge of that matter?
A. We paid Dudley so much per ton for the coal delivered on the car.
Q. Did the Creek nation have anything to do with seeing to the weighing of that coal?
A. They had a national weigher there.
Q. Who was it?
A. Robert Perryman.
181 Q. By whom was he appointed?
A. By the chief.
Q. Chief of the Creek nation?
A. Yes sir.
Q. He kept track of all the coal that was placed on the cars, did he not?
A. Yes sir.
Q. Now, how long did you continue to deliver coal there?

of the Secretary of the Interior, belonging to such tribe or nation. And for the purposes of this regulation all such officers shall be required to file with the said United States Indian agent, in duplicate, a claim for salary, setting forth the amount claimed to be due, the time within which the services for which compensation is claimed were rendered, that the services were actually performed by the claimant, the tribal law under which said services are alleged to have been rendered, and evidence that the party claiming compensation as an officer of any such tribe or tribes is in fact such officer (such as the original appointment or the election of such person to fill the position claimed to be occupied by him), and said claim shall be duly verified by the claimant.

17. All salaries of teachers employed in the public schools of any tribe or nation to which these regulations apply, payable out of the funds of such tribe or nation, shall be paid by the United States Indian agent under the supervision and direction of the United States Indian inspector for the Indian Territory, and by authority of the Secretary of the Interior, out of any moneys of the tribe or nation available for the purpose, and all such teachers shall be required to file with the United States Indian agent, in duplicate, a claim under oath for the amount of salary, furnishing the information and evidence required in the above regulation for the payment of salaries of officers of such tribe or nation.

159 18. Before any salaries of tribal officials or teachers, as above provided, shall be paid by the United States Indian agent, the claims of such officers and teachers shall first be transmitted by the agent through the United States Indian inspector for the Indian Territory, with a full and detailed report and all evidence filed therein, to the Commissioner of Indian Affairs, to be submitted to the Secretary of the Interior for his action thereon, and upon approval thereof, the United States Indian agent shall make requisition for the money necessary to pay the salaries authorized to be paid, and shall pay the same, rendering account in the usual manner therefor.

Schools.

19. For the purpose of the proper supervision of the schools of any tribe or nation to which these regulations apply there shall be appointed by the Secretary of the Interior a capable, competent, and discreet person, who shall have had experience in educational work, to be designated as "supervisor of schools in the Indian Territory," whose duty it shall be, subject to the direction and supervision of the United States Indian inspector, to visit from time to time, examine into and supervise the conduct of schools of such tribe or nation, and to report fully and in detail, as often as may be desirable (at least once in every month) to the Commissioner of Indian Affairs, through the United States Indian inspector, the condition of each school in the Territory, the methods of instruction employed,

the efficiency of the teachers engaged, and shall make such recommendations concerning the same as he shall deem best.

160 20. The compensation of such supervisor of Indian schools for the Indian Territory shall be $1,500 per annum, with commutation of subsistence at the rate of $3 per diem, when absent from home in the discharge of his official duties, and all actual and necessary expenses for transportation, payable out of the general appropriation for Indian schools.

21. Should it appear from the report of the supervisor of Indian schools for the Indian Territory at any time that any teacher of any school is incompetent to properly instruct the pupils of such school, or is of immoral character, or that for any reason the continuance of such teacher in the service would be to the detriment thereof, then it shall be the duty of the Commissioner of Indian Affairs to bring the matter to the attention of the Secretary of the Interior for his consideration and action, the purpose of this regulation being to provide efficient, competent, and moral instructors for the youth of the Indian Territory, in order to fit them to become good, useful members of society.

22. The right to change, modify, or amend these regulations is reserved.

CORNELIUS N. BLISS, Secretary.

Department of the Interior, Washington, November 4, 1898.

161 APPENDIX.

Forms of Mining Lease, Bond, and Affidavit of Surety Prescribed by the Secretary of the Interior under Section 13 of the Act of Congress Approved June 28, 1898 (30 Stat., 495).

(Write All Names and Addresses in Full.)

(Indian Territory Mining Lease (—— Nation).

Indenture of lease, made and entered into, in quadruplicate, on this — day of ——, A. D. 189–, by and between —— ——, as Secretary of the Interior, party of the first part, and —— —— of ——, county of ——, State or Territory of ——, part- of the second part, under and in pursuance of the provisions of second 13 of the act of Congress approved June 28, 1898 (30 Stat. 495).

Now therefore, this indenture witnesseth, that the party of the first part for and in consideration of the royalties, covenants, stipulations, and conditions hereinafter contained and hereby agreed to be paid, observed, and performed by the part- of the second part, — executors, administrators, or assigns, does hereby demise, grant, and let unto the part- of the second part, — executors, administrators, or assigns, the following-described tract of land, lying and being within the — Indian nation and within the Indian Territory, to

wit: The — of section —, of township[1] — of range[2] — of the Indian meridian, and containing — acres, more or less, for the full term of — years from the date hereof for the sole purpose of prospecting and mining[3] ——.

In consideration of which the part- of the second part hereby agree- and bind — executors, administrators, or assigns, to pay,
162 or cause to be paid, to the United States Indian agent for the Union agency as royalty the sums of money as follows, to wit:

On the production of all coal mines developed and operated under this lease, the sum of — cents per ton for each and every ton of coal produced.

On asphaltum, the sum of — cents per ton for each and every ton produced.

On oil, the sum of — per cent. of the value of all oil produced.

On all other minerals—such as gold, silver, iron, and the like—as follows (sampling charges to be first deducted): On all net smelter returns of ore of fifty ($50) dollars per ton and under, a royalty of ten (10) per cent.; on all net smelter returns of ore over fifty ($50) dollars per ton and less than one hundred and fifty ($150) dollars per ton, a royalty of fifteen (15) per cent.; on all net smelter returns of ore over one hundred and fifty ($150) dollars per ton and less than three hundred ($300) dollars per ton, a royalty of twenty (20) per cent., and on all net smelter returns of ore over three hundred ($300) dollars per ton, a royalty of twenty-five (25) per cent.

And all said royalties accruing for any month shall be due and payable on or before the twenty-fifth day of the month succeeding.

And the part- of the second part further agree- and bind — executors, administrators, or assigns to pay or cause to be paid to the United States Indian agent for the Union agency, Indian Territory, as advanced royalty on each and every mine or claim within the tract of land covered by this lease, the sums of money as follows, to wit: one hundred dollars per annum in advance for the first
163 and second years, two hundred dollars per annum in advance for the third and fourth years, and five hundred dollars per annum in advance for the fifth and each succeeding year thereafter of the term for which this lease is to run, it being understood and agreed that said sums of money to be paid as aforesaid shall be a credit on royalty, should the part- of the second part develop and operate a mine or mines on the lands leased by this indenture, and the production of such mine or mines exceed such sums paid as advanced royalty, as above set forth; and further, that should the part- of the second part neglect or refuse to pay such advanced annual royalty for the period of sixty days after the same becomes due and payable under this lease, then this lease shall be null and void, and all royalties paid in advance shall become the money and

[1] State whether north or south. [2] State whether east or west. [3] State what mineral is sought.

property of the —— tribe of Indians subject to the regulations of the Secretary of the Interior aforesaid.

The part- of the second part further covenant- and agree- to exercise diligence in the conduct of the prospecting and mining operations and to open mines or sink wells for oil, and operate the same in a workmanlike manner to the fullest possible extent on the above-described tract of land; to commit no waste upon said said land or upon the mines that may be thereon, and to suffer no waste to be committed thereon, to take good care of the same, and to surrender and return the premises at the expiration of this lease, to the party of the first part, in as good condition as when received, ordinary wear and tear in the proper use of the same, for the purposes hereinbefore indicated, and unavoidable accidents excepted, and not to remove therefrom any buildings or improvements erected thereon during said term by —— ——, the part- of the second part, but said buildings and improvements shall remain a part of said land and become the property of the owner of the land as a part of the consideration for this lease
164 in addition to the other considerations herein specified, except engines, tools, and machinery, which shall remain the property of the said part- of the second part; that — will not permit any nuisance to be maintained on the premises, nor allow any intoxicating liquors to be sold or given away to be used for any purposes on the premises, and that — will not use the premises for any other purpose than that authorized in this lease, nor allow them to be used for any other purpose; that — will not at any time during the term hereby granted assign or transfer — estate, interest, or term in said premises and land or the appurtenances thereto to any person or persons whomsoever without the written consent thereto of the party of the first part, or his successors in office.

And the said part- of the second part, further covenant- and agree- that — will keep an accurate account of all mining operations, showing the whole amount of mineral- mined or removed, and that there shall be a lien on all implements, tools, movable machinery, and other personal chattels used in said prospecting and mining operations, and upon all such minerals, metals, and substances obtained from the land herein leased, as security for the monthly payment of said royalties.

And the part- of the second part agree- that this indenture of lease shall be subject in all respects to the rules and regulations heretofore or that may be hereafter prescribed under said section 13 by the Secretary of the Interior; and, further, that should the part- of the second part, — executors, administrators, or assigns, violate any of the covenants, stipulations, or provisions of this lease, or fail for the period of thirty days to pay the stipulated monthly royalties provided for herein, then the party of the first part shall be at
165 liberty, in his discretion, to avoid this indenture of lease and cause the same to be annulled, when all the rights, franchises, and privileges of the part- of the second part, — executors, admin-

istrators, or assigns, hereunder, shall cease and end, without further proceedings.

The part- of the second part — firmly bound for the faithful compliance with the stipulations of this indenture by and under the bond made and executed by the part- of the second part as principal- and —— —— as suret-, entered into the — day of ——, 189-, and which is on file in the Office of Indian Affairs.

In witness whereof the said parties of the first and second parts have hereunto set their hands and affixed their seals the day and year first above mentioned.

—— ——,
Secretary of the Interior.

[SEAL.]

Two witnesses to each signature.

—— ——, } as to —— ——. [SEAL.]
—— ——, }

—— ——, } as to —— ——. [SEAL.]
—— ——, }

—— ——, } as to —— ——. [SEAL.]
—— ——, }

—— ——, } as to —— ——. [SEAL.]
—— ——, }

—— ——, } as to —— ——. [SEAL.]
—— ——, }

No. —. Department of the Interior, Washington, D. C. Mineral lease. Indian Territory. The Secretary of the Interior to —— ——. — of — sec. — tp. — R. — in the —— Nation, Indian Territory. Dated —— 189-. Expires —— 19—.

4 stamps are required by the act of June 13, 1898, to be placed on leases as follows: Leases for one year, 25 cents; for more than one year and not exceeding three years, 50 cents; and for more than three years, $1. Lessees must furnish stamps for all leases.

DEPARTMENT OF THE INTERIOR,
U. S. INDIAN SERVICE, UNION AGENCY,
MUSCOGEE, I. T., ——, 189-.

Respectfully forwarded to the Commissioner of Indian Affairs for consideration with my report of even date.

—— ——,
Indian Inspector.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, D. C., ——, 189-.

Respectfully submitted to the Secretary of the Interior with favorable recommendation.

—— ——,
Commissioner.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., ——, 189–.

Approved:

—— ——, Secretary.

166 Bond.

Know all men by these presents, that we[1] —— —— of —— as principals and —— —— of —— and —— —— of —— as sureties, are held and firmly bound unto the United States of America in the sum of — dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our heirs, successors, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated — day of ——, eighteen hundred and ninety —.

The condition of this obligation is such, that whereas the above bounden —— —— as principal-, entered into a certain indenture of lease dated ——, 189–, with —— —— the Secretary of the Department of the Interior, for the lease of a certain tract of land located in the —— Nation, Indian Territory, for the purpose of prospecting for and mining — for the period of — years.

Now, if the above bounden —— —— shall faithfully carry out and observe all the obligations assumed in said indenture of lease by — and shall observe all the laws of the United States, and regulations made, or which shall be made, thereunder, for the government of trade and intercourse with Indian tribes, and all the
167 rules and regulations that have been or may be prescribed by the Secretary of the Interior under section 13 of the act of June 28, 1898 (30 Stat., 495), relative to mining leases in the Indian Territory, then this obligation shall be null and void, otherwise to remain in full force and effect.

—— ——. [L. S.][3]
—— ——. [L. S.]
—— ——. [L. S.]
—— ——. [L. S.]
—— ——. [L. S.]
—— ——. [L. S.]

Signed and sealed in presence of[2]

—— ——.
—— ——.

[1] The Christian names and residences of principals, and of the sureties, where personal sureties are given, of whom there must be two.

[2] There must be at least two witnesses to all signatures, though the same two persons may witness all.

[3] A seal must be attached by some adhesive substance to the signatures of principals and sureties.

tions, as above indicated, and that persons or corporations claiming preference rights under the provisions of section 13 of said act and the regulations made thereunder, must file with the United States Indian inspector for the Indian Territory separate applica-
191 tions for mining leases in accordance with the provisions of said regulations as herein amended, within thirty days from the date of said notice, and you will, in addition, send a copy of said notice by mail to any person or corporation that has heretofore filed with said inspector a mining application, claiming a preference right by reason of improvements, made under said section 13 and the regulations thereunder."

Respectfully, E. A. HITCHCOCK, Secretary.

Ind. Ter. Div.
1813–1899

Q. I will call your attention to this copy of a letter and ask you to state whether that copy of a letter was shown to Mr. Greer and Mr. Guss at that time?

A. Yes, sir.

Here the same is marked Exhibit "R" and offered in evidence by the plaintiff.

Objected to as incompetent, irrelevant and immaterial, which objection was by the court overruled.

The same is as follows:

EXHIBIT "R."

FORT SCOTT, KANS., June 23, 1899.

To the honorable Secretary of Interior, Washington, D. C.

DEAR SIR: The above named ten coal companies were duly chartered under and pursuant to the laws and customs of the Creek nation in the Indian Territory in the year 1896 and 1897.
192 These companies have in good faith previous to and since their incorporation, expended in the neighborhood of $50,000 or more in the development of coal in the Creek Nation in the Indian Territory. The lease cover- tracts of land amounting to about 1,100,000 acres. At the time of their incorporation the Creek nation had not been sectionized and for that reason the boundaries of the land in each lease are described by meets and bounds, and the exact quantity of land cannot definitely be stated.

The Tulsa Coal & Mining Company subleased to the Kansas & Texas Coal Company in the fall of 1898, which company has been operating under such sublease since then. Coal has been discovered by these companies upon all these leases. These companies feel that they have a vested right for the money that is expended, at least in developing the coal in the Creek Nation, because the same has been of inestimable value to the people of that nation.

The act known as the Curtis law has greatly embarrassed these companies, and has practically brought things to a stand still. These companies have at all times been advised that their leases were valid, and in view of the large expenditure of money, that the rights defined in the leases could not be divested. But in view of the unsettled condition of things under and by reason of the Curtis act, and other things that have arisen since then, it has been thought by these companies proper to write to you for an approval of these leases, or for such act or acts on the part of the department as will protect the companies in their rights. If it should be determined that the Curtis act is valid, then these companies desire that their rights be protected in the first selections of lands for coal mining purposes, and would be glad to be advised by the department as to what its rulings therein are or will be.

193 An answer to this letter will be gladly received, as the coal companies desire to do nothing but what is within the letter and spirit of the law, with a view to protecting the interests of each for the trouble and expenses already incurred, and for future operations.

Yours very respectfully, W. R. BIDDLE, Pres.

Q. Now at that time, at the time Mr. Greer and Mr. Guss were there, was the question of the validity of these leases discussed?

A. Yes sir, gone over thoroughly and the books in the office of the company, and the minutes were read and the leases.

Move to strike out the answer of the witness as being a conclusion, which motion was by the court overruled.

Q. What books of the company were shown these parties at that time, what papers?

A. All of the records.

Q. Were these leases or charters?

A. Yes sir, and all the opinions that we had of the attorneys.

Q. They were laying there on the table were they not, in the room?

A. They were in the vault; they were brought out to them, and the receipts for all the royalty up to the time of the Curtis act from the nation were shown them,—as long as we could pay royalty, we did pay it.

Q. Do you remember Mr. Nelson when this lease was made by the Tulsa Company to the Kansas & Texas Coal Company?

A. I don't see any date on it.

Q. That is, do you remember of its being executed?

A. Yes sir.

Q. After that time did you have anything to do with the
194 management or control of the leases?

A. No sir.

Q. Who was the controlling person under that?

A. Col. Brown.

Q. Now at the time that you had this conversation with Guss and Greer was there anything said about who was in control of the companies?

A. Yes sir.

Q. What was said in that respect?

A. He was looking after all of them.

Q. I will ask you this question, whether, after Col. Brown got control and this lease was made, whether you ever knew of the company to have received any royalties, up to the time that you made this contract with the defendants?

A. Not a cent.

Q. Did you talk with Greer and Guss about the way that Col. Brown run it?

A. Yes sir.

Q. What did you say to them about it?

A. I told them I didn't think as long as he run it they would ever get a cent; he was making the representations to us that he wasn't doing anything, wasn't shipping any coal; and made the same representations as that at the meeting on the second of January, and the record appeared to show that he was shipping five or six cars a day.

By Mr. HORNOR:

Q. What record shows that?

A. The record of the royalties paid.

Q. The record that was introduced yesterday?

A. Yes sir.

195 By Mr. BIDDLE: At the time that Mr. Greer and Mr. Guss were up there, was there any talk between you and them in reference to purchasing or selling stock to each other, that you remember?

A. We might have discussed it, but nothing definite.

Q. Do you remember whether anything was said about it?

A. We talked of buying Brown's stock, I remember that.

Q. Now, after that did you have any correspondence with Mr. McNeal or either of these defendants in reference to buying or selling stock in that company?

A. Yes sir.

Q. During what year?

A. 1900.

Q. Did you before 1900?

A. I don't think so.

Q. That was previous to the time this contract was made?

A. Yes sir.

Q. Do you remember how many letters passed between you?

A. No sir, I do not.

Q. How did you happen to come to Guthrie on the 28th of May?

A. In response to a telegram asking me to come.

Q. From whom?

A. From McNeal.
Q. Have you got that telegram?
A. No sir.
Q. Do you know what has become of it?
A. No sir.
Q. Well, is it lost?
A. Yes sir.
Q. You may state what the contents of it were?

Objected to as incompetent, which objection was by the court sustained.

196 Q. Is that telegram lost?
A. Yes sir.
Q. Destroyed?
A. Yes sir.
Q. Now, you may state what was the contents of it?

Objected to as incompetent——

Q. Is it lost?
A. I don't know where it is.
Q. What did you do with it?
A. I don't know, lost it I reckon, I didn't keep it.
Q. Is it among your papers?
A. No sir.
Q. Do you know what became of it?
A. No sir.
Q. What did you do with it?
A. Lost it I reckon.
Q. Did you throw it in the waste basket?
A. I threw it away or tore it up.
Q. Now you may state what the contents of it were.

Objected to as incompetent, which objection was by the court overruled, to which the defendants excepted.

A. He asked me to come to Guthrie,——
Q. State as near as you can the wording of it, as near as you remember?
A. Well, I think it stated "Come to Guthrie. We will pay all expenses." As near as I can recollect.
Q. As I understand you, you had been previously corresponding in reference to the sale or purchase of the stock?
A. Yes sir.
Q. Where was that telegram sent from?
A. From here.
197 Q. To what point?
A. Ft. Scott, Kansas.
Q. Where was the headquarters of this company at that time?
A. Ft. Scott.
Q. In your charge?

A. Yes sir.
Q. You were secretary at the time?
A. Yes sir.
Q. Pursuant to that telegram, what did you do?
A. Came down here.
Q. What did you bring with you, if anything?
A. I brought the stock and the leases and the opinions of all the attorneys that I had.
Q. What opinion?
A. The opinion of Mr. Richards, and this one that you have here, and one prior to that, and the opinion of yourself and the opinion of W. C. Perry and Senator Baker.
Q. Were those opinions all in writing?
A. Yes sir.
Q. What time did you arrive in Guthrie?
A. I think about ten o'clock on the night of the 27th.
Q. When did you first see these defendants, if at all, after you arrived here?
A. About nine o'clock the next morning.
Q. Where?
A. At the Guthrie national bank.
Q. Were all of these defendants there at that time?
A. No.
Q. Who did you first see?
A. Mr. McNeal.
Q. Who, if anyone, came in afterward?
198 A. They were all there during the day, at different times.
Q. How long was it before this contract was written or when was this contract written?
A. I think about four or five o'clock in the afternoon.
Q. And what time was it signed?
A. About that time, after the bank closed, I know.
Q. Were you in the bank all that day?
A. No, sir, not all day.
Q. State to the court just where you went and what you did?
A. I was there three or four times during the day, and I was up to Mr. Gray's office twice, and up to Mr. De Bois's office once or twice.
Q. How did it happen you went to see Mr. De Bois?
A. I don't remember.
Q. Did he have anything to do with the transaction?
A. I always understood he was a stockholder in it; he had an interest in this stock.
Q. Is that why you went to see him?
A. That is one reason.
Q. Where was the contract dictated or written?
A. In the Guthrie national bank.
Q. Who dictated it?
A. Mr. McNeal, I think.

Q. Where was it signed?
A. It was signed there.
Q. Now, at that time, did you represent that you had perfected these leases under the Curtis act?

Objected to as leading, which objection was by the court sustained.

Q. Was any such question asked you?

Objected to as leading, which objection was by the court
199 sustained.

Q. Did you say anything at that time in reference to the production of coal at the Tulsa mine?
A. Yes sir.
Q. What did you say to them?
A. I hadn't been at the mine since we had the meeting in January, and I told them that, but I had been up to Milwaukee with Brown, to see if he was going to buy a steam shovel that he had promised to buy or said when he was at the meeting that the Kansas & Texas people were going to buy, and Mr. Hobart told me——

Objected to——

Q. Is this what you told them?
A. Yes sir.
Q. By the way, who was Hobart?
A. Hobart was president of the Kansas & Texas Coal Company.
Q. He was the leading spirit in it?
A. Yes sir.
Q. Where was his headquarters?
A. St. Louis.
Q. State what you said?
A. That when he got this steam shovel he would ship from twenty to thirty cars a day, that he wouldn't have a mine unless he could ship that much, that he had investigated it and was going to buy a steam shovel; I made these statements to these gentlemen; I never represented that I had been at the mine after this meeting occurred, and I don't know but I had seen Brown frequently and went to Milwaukee with him sometime between January and May.
Q. That is, you went to Milwaukee with him at the time this steam shovel was contracted for?
A. Yes sir.
Q. And you went for that purpose?
A. Yes sir.
200 Q. Did you tell them that you had been with Brown to Milwaukee?
A. Yes sir.
Q. Did you in fact know at that time what coal had been taken out of the mine?
A. Only the statement that Brown made in your presence and

Mr. De Boise's; he claimed he was only taking out two or three cars a week.

Q. Did you state that to them?

A. Yes sir, I stated that to them, but I told them I didn't believe it, the statement shows what he was taking out.

Q. Was there any conversation at that time in reference to how Brown was running the mine?

A. Yes sir.

Q. State what was said in that respect?

A. I told them I couldn't get any settlement out of him, couldn't do anything with him, couldn't get any statement out of him whatever he made no statement to the company, and that the only way would be to get control and take it out of his hands.

Q. Go on and state further what was said if you remember?

A. I don't remember of much else that was said.

Q. Was there anything said about your purchasing their stock?

A. Yes sir, I offered to purchase their stock.

Q. Did you in that conversation say anything about what the law was as to these leases and as to their legality?

A. Only in a general way, we discussed the opinions of these attorneys on the Curtis act.

Q. Was there any conversation there about having the royalties paid or anything of that kind?

A. Yes sir.

Objected to as to the form of examination, which objection was by the court overruled.

201 Q. What was said in that respect?

A. I told them that all the royalty had been paid up to the Curtis act, and the receipts for every dollar of it were on file, and I had seen every dollar recorded in the books at Okmulgee, and had paid every dollar of it myself, and had been there in person; as long as we could pay royalty and mine coal we paid it there. That we paid royalty on the two leases that we could operate on, that was on the Tulsa lease and the Sapulpa. That money that was expended in the other was recorded and an account of it made at Okmulgee, and it was impossible to mine coal, there was no railroad, and it was eighteen or twenty miles to the coal, and we hadn't marketed any coal only from a little mine close to Okmulgee; that I think was possibly forty or fifty tons that we sold there, and that we had marketed coal on the Sapulpa lease and paid royalty on it.

Q. That is the Sapulpa lease?

A. Yes sir.

Q. That is the lease that is west of this Tulsa lease, is it—south?

A. South and west, across the river.

Q. That is the lease that the Frisco road also runs through?

A. Yes sir.

Q. Had you worked that lease?

A. Yes sir, we had.

Q. How many carloads had you shipped?
A. I think fourteen or fifteen.
Q. And had you paid all of the royalties on it?
A. Yes sir.
Q. Was that coal that you took out of that lease and shipped away weighed by this weigher that was appointed?
A. No, we agreed to take the railroad weights for it, we had
202 no scales there.
Q. Did you say anything to them about the royalties being paid since Brown had charge of the mines?
A. I told them I knew nothing about that, and didn't.
Q. Did you say anything to them in that conversation about that conversation with Mr. Wright, the Indian agent?
A. Yes sir.
Q. What did you say to them?
A. I told them exactly what it was, that he had been there with *is* and what he said.
Q. What did you tell them?
A. That we could get 640 acres on each lease.
Q. That he had said that?
A. Yes sir. I never told them I had paid any advance royalty on it; I had no record of it, and had made no application for it; I had paid no advance royalties under this Curtis act; there was a question whether we would act under that or stand on those leases.
Q. That was a question that was discussed?
A. Yes sir.
Q. Did you ever go with either of these defendants over into the Creek Nation from here or ever see them over there, previous to the time this contract was made?
A. I made a trip across the country with some of them from here over there in a buggy.
Q. Do you remember which one it was?
A. I believe it was Mr. Gray.
Q. Are you certain about that?
A. Yes sir, I am certain he was one of them; I don't remember whether there was another along or not.
203 Q. Did you go clear over to the Creek Nation?
A. Yes sir.
Q. Did you go up into the Sapulpa lease?
A. Yes sir.
Q. Did you go to the Tulsa lease?
A. I don't remember whether we went to the Tulsa lease or not.
Q. Did you go to Okmulgee, the capital of the Creek Nation?
A. We went to Okmulgee on that trip, I don't remember whether Mr. Gray was along or not at the time.
Q. And that was in reference to the building of this railroad, wasn't it?
A. Yes sir.

Objected to as immaterial, for the reason that this issue is admitted, which objection was by the court sustained.

Q. Now, Mr. Nelson, you remember about the time of the passage of what is known as the Curtis act, do you?

A. Yes sir.

Q. After that act was passed, was there anyone appointed Indian agent, as provided by that act?

Objected to as to the competency of the witness, which objection was by the court sustained.

Q. Was there anyone appointed there as the Indian agent, that you know of?

A. At the Tulsa mine?

Q. Oh, no, having control of the mining matters in the Creek nation?

A. Yes sir.

Q. Who was it?

A. Mr. Wright.

Q. What is his full name?

A. J. George Wright.

Q. Was he appointed before or after the passage of the Curtis act?

A. Well, I don't remember.

182 Q. Where was his headquarters?

A. Muscogee.

Q. Now, after his appointment, did you ever have any conversation with him?

A. Yes sir.

Q. Where?

A. At Muscogee, and over in the Creek Nation at the Tulsa mine.

Q. Do you remember when you saw him at Muscogee first?

A. No, I don't remember when I saw him first.

Q. What year was it?

A. I think I saw him in 1898.

Q. Did you have any conversation with him in reference to your leases?

A. Yes sir.

Q. Where were you when you had that conversation?

A. Well, I saw him repeatedly, saw him at Muscogee and he went with us over on these leases, two of them.

Q. What lease did he look at?

A. The Tulsa lease and Sapulpa lease.

Q. Did you ever talk with him about making application under the Curtis act?

A. Yes sir.

Q. You may state what the conversation was.

A. Mr. Wright saw these leases, examined them, and he examined the property of the Tusla mine and the Sapulpa mine, south of

the Arkansas river. He saw this statement of what we had expended on the other mines and said we had a perfect right to 640 acres on each lease and no more.

Q. Was there anything further said?

A. That is about all I remember of.

Q. Did you have any conversation with him afterwards?

183 A. I don't know that I had.

Q. Did you ever make application for any of those leases?

A. Brown took charge of the matter then.

Q. Do you know what he did?

A. No sir, I don't know positively.

Q. Brown had charge of the company at that time?

A. Yes sir.

Q. Did you ever have any talk with him in reference to permit?

A. With Mr. Wright?

Q. Yes sir.

A. No sir, I never had a talk with him after he was over in the Creek Nation with us, and that was in 1899.

Q. Did you have any conversation with either of these defendants in reference to that conversation with Mr. Wright?

A. Yes sir.

Q. Who?

A. All of them.

Q. When?

A. At various times.

Q. Do you remember of meeting with Mr. De Bois and Mr. Campbell, myself and Col. Brown on January 2, 1900, at Ft. Scott, in the office of the company?

A. Yes sir.

Q. Was this question discussed at that time?

Objected to as incompetent, irrelevant and immaterial, which objection was by the court sustained, to which the plaintiff excepted.

Q. Now, do you remember of meeting Mr. Greer and Mr. Guss sometime in 1899 in the office of the company?

A. Yes sir.

Q. Do you remember what time in 1899 it was?

184 A. No, I don't, I think it was in the summer.

Q. At that time who was present, do you remember?

A. I remember Mr. Greer and Mr. Guss.

Q. Who else?

A. That is all I remember now.

Q. Was your brother there, C. C. Nelson?

A. Yes sir.

Q. Was I?

A. Yes sir.

Q. Do you remember whether the opinion of Mr. Richards, which I now hand you, was handed to those gentlemen?

A. Yes sir, and also the opinion of Mr. Baker and yourself.

Here the same is marked Exhibit "O."

Q. I will call your attention to this opinion, dated April 24, 1899, was that opinion handed to Mr. Greer and Mr. Guss?

A. Yes sir.

Here the same is marked Exhibit "P."

Q. Did you have at that time the opinion of Senator Baker of Kansas?

A. Yes sir.

Q. Was that opinion handed to them?

A. Yes sir.

Here Exhibits "O" and "P" are offered in evidence and marked as before.

Objected to as incompetent, irrelevant and immaterial, which objection was by the court overruled, to which the defendants excepted.

EXHIBIT "O."

FORT SCOTT, KAS., April 24, 1899.

Mr. J. T. Nelson, Fort Scott, Kansas.

185 DEAR SIR: Referring to our conversation to-day relative to the effect of the Curtis act for the protection of the people of the Indian Territory, and its bearing upon coal leases regularly made prior to the passage of said act, full compliance with the laws having been likewise made since the leases were executed, I will say that after carefully reading said Curtis act I am confirmed in the opinion which I have heretofore given you that such leases having conferred upon the lessees vested rights, such rights are not invalidated by said act. Indeed, there are, I note, several provisos and reservations in said act and specially in sections eleven and thirteen, which seem to be plain recognitions of vested rights. For instance, section 11 provides:

"Nothing herein contained shall in any way affect any vested legal rights which may have been heretofore granted."

And in section 13 it is further provided:

"That, when, under the customs and laws heretofore existing and prevailing in the Indian Territory, leases have been made of different groups or parcels of oil, coal, asphalt, or other mineral deposits, and possessions had been taken thereunder, and improvements made for the development of the same 'by lessees or their assigns, which have resulted in the production of' the same 'in commercial quantities by such lessees or their assigns, then such parties in possession shall be given preference in the making of new leases, in compliance with the directions of the Secretary of the Interior."

It is true that this act seems to contemplate that these leases shall be renewed with the tribes under the direction of the

Secretary of the Interior and that rates of royalty shall be paid by all lessees fixed by that Secretary and which are inconsistent to that extent with the rights of lessees prior to the act
186 and under leases made direct by the nations or tribes, but it is my opinion Congress can not swerve these contracts, or the rights guaranteed by them, one hair's breadth, excepting merely in so far as the Indian nations or tribes themselves are concerned. I do not think there is any doubt but what Congress has the power to modify these leases so far as it may be necessary to make practical to control and care for the Indians' rights to the utmost and to this extent there may possibly be some modification of the mode of carrying out the contracts; but as to the rights themselves, and the main features of the contracts legally made whereby the integrity of these rights have been preserved, I do not believe they can be altered or invalidated. The very fact that there is some general recognition of these rights, and that they are spoken of as "vested rights" in the act itself, shows that Congress knew of them and knew of the acts under and by which these leases were made and recognized the duty of the United States to protect them; but, as is usual with Congress, they have at the same time not had that regard for them which the law vouchsafes.

It is my judgment that all that is necessary is for the persons having good valid leases, and who have complied strictly with the letter of law, to stand on their rights and no doubt they can make substantial equitable arrangements for their protection with the Secretary of the Interior. This I would advise all persons having such leases to try to do as early as possible.

In conclusion I therefore say the Curtis act at least does not abrogate these leases and does not seem to try to do so.

Very truly, J. H. RICHARDS.

187 EXHIBIT "P."

FORT SCOTT, KANSAS, April 24th, 1899.

J. T. Nelson, Esq., Ft. Scott, Kansas.

DEAR SIR: You asked me to give an opinion as to the validity of the ten coal leases in the Creek Nation in the Indian Territory.

I have carefully examined this matter and have examined the treaties under which the Creek nation obtained this land, and also the laws of the United States heretofore enacted, and am clearly of the opinion that such leases are valid.

The work performed on them in their development, together with the laws and treaties give to the corporations owning leases a vested right therein, which cannot in my judgment be taken away by Congress and will be upheld by the United States courts.

I have carefully read the Curtis bill, as it is called, and am satisfied that it infringes upon the rights of the Creek people and attempts to control property and rights which are vested and belong

to the tribe. Such rights are not subject to the control of anybody, but belong exclusively to the Creek nation itself.

The title of the Creek nation to its land is a title in fee simple. This the Curtis act recognizes, but attempts to control its divisions among the members of the tribe, with however, the condition that the tribe by vote must assent to its provisions.

Wherein the Curtis act attempts to divest the Creek nation from controlling its own property and the uses and benefits of the same, it will be held unconstitutional. It is so held by the best lawyers of the Territory. Of course these leases are for a good and valuable consideration and upon the faith of them, much money has
188 been expended, which gives to the lessees a vested right which no Federal court will ignore.

Yours very truly, W. R. BIDDLE, Att'y.

A. And also I could tell you, Mr. Perry's.

Q. Now, at that time, do you remember any conversation had about the correspondence that I, as president of this company, had with the Secretary of the Interior in reference to those leases?

A. Yes sir.

Q. I will call your attention to this paper marked Exhibit Q. I will ask you to state whether that letter was shown Mr. Guss and Mr. Greer at that time?

A. Yes sir.

Here the same is offered in evidence, marked Exhibit "Q."

Objected to as incompetent, irrelevant and immaterial, which objection was by the court overruled.

EXHIBIT "Q."

DEPARTMENT OF THE INTERIOR,
WASHINGTON, June 27, 1899.

W. R. Biddle, president Indian Territory Associated Coal Companies, For Scott, Kansas.

SIR: The department is in receipt of your letter of June 23, 1899, in which you state that the companies you represent "have in good faith previous to and since there incorporation, expended in the neighborhood of $50.000, or more, in the development of coal in the Creek Nation in the Indian Territory. The lease covers tracts of land amounting to about 1,100,000 acres. At the time of their incorporation the Creek Nation had not been sectionized, and for that reason the boundaries of the land in each lease are de-
189 scribed by meet-s and bounds, and the exact quantity of land cannot be definitely stated."

You further state that "if it should be determined that the Curtis act is valid, then these companies desire that their rights be protected in the first selections of lands for coal mining purposes, and

would be glad to be advised by the department as to what its rulings therein are or will be."

In reply, you are advised that the matter of leasing mineral lands in said nation was fully considered by the department on May 22, 1899, on which date the United States Indian inspector for the Indian Territory was instructed as follows:

"It is not and will not be the policy of the department to allow single individuals or corporations to include immense tracts of land in a large number of separate leases, although said parties may be willing to pay the advance royalty prescribed for each individual lease. On the other hand, in the exercise of the sound discretion which is vested in the Secretary of the Interior, it is not the purpose of the department to deprive any person or corporation of the benefits to which such person may be entitled where the person has in good faith entered upon land under the tribal customs and laws, and invested money in improvements and in the development of the mineral resources, and where the efforts of such person or corporation 'have resulted in the production of oil, coal, asphalt, or other mineral in commercial quantities.' No fixed rule, however, can be established, but each case must rest upon its own individual merits. In the cases of mineral leases, as in the case of acquiring title to the public lands of the United States, good faith must be the test upon which every application shall be made, and in addition to the requirements in said regulations, paragraphs 10 and 11,
190 each applicant will be required to file with his application with the United States Indian inspector, a plat showing the land applied for, the exact location and extent of the improvements made, and he must also state the value of the improvements, the amount of mineral that has been mined, and whether there is any adverse occupant or claimant to the land; and he should also refer to and properly describe the tribal lease under which he has been acting; giving the time when said lease will expire. Each contract of lease will also contain a provision that it shall continue for a term of fifteen years, unless, by duly ratified agreement with the Indians, or by law of Congress, the allottees shall become entitled to the mineral in allotments, and in that event the lease shall expire on the final completion of individual allotments, or the issuance of patents by the proper authorities to the allottees for the lands included in their allotments."

He was further advised:

"In view of the earnest protests made by the authorities of the Creek and Cherokee nations, no applications for mineral leases will be received from parties who have not entered upon *and* lands and made improvements thereon for the purpose of developing the mineral in said lands under the tribal usages or customs, or under the provisions of said act of June 28, 1898, and said regulations of November 4, 1898, said regulations are hereby amended in accordance with the views above indicated.

You will give notice by publication of the change in said regula-

A. Well, it was largely spent in that way, we had one of the best coal experts with us that superintended that prospecting.

Q. Now, I will ask you in regard to the statement to these people when you were here, isn't it a fact that at the time that you believed and understood that Brown was getting out coal to the
213 amount of—if the royalty was properly paid on each of these companies,—out of the Tulsa mine to the amount of $20 to $40 per day, if he would make an accurate account of it?

A. I believe, exactly as I told you in January prior to that time, that Brown told us he was getting two or three cars a week and I didn't believe him; that I hadn't been to the mine since; that I had seen Hobart since, and that we had negotiated for a steam shovel that was either there at that time or would be immediately afterward; that Hobart had told me, but I didn't tell you that, that when he got this shovel he would ship from twenty to thirty cars of coal a day. I didn't represent to you that the shovel was there, nor how much coal he was getting out, because I didn't know, only from hearsay.

Q. Well, I am asking you, isn't it a fact that you really believed and understood at that time as a matter of fact, that Mr. Brown was taking out enough coal out of the Tulsa mine, if he would pay the royalty under this lease to these companies, that would amount to $30 or $40 per day?

A. No sir, I don't believe that he was taking out as much as the accounts showed he was; I thought he was taking out more than he said he was, but I didn't realize he was taking out that much.

Q. When was your last time down to the mine before making this trade?

A. Just previous to your coming to Ft. Scott.

Q. Now, when was it you went with Col. Brown to Milwaukee to buy this machine?

A. Sometime between January and May.

Q. Wasn't it really sometime about the middle of April or the first of May?

A. No sir, I can tell you the exact date I went on, I have a record of it.

214 Q. What is the exact date?

A. I thought I had the memorandum here but I haven't. I don't know what I did with it. Now, I was in Milwaukee twice,—Parker was up on that trip.

Q. Now, I will ask you, Mr. Nelson, did you understand that Mr. Brown—that this company had a contract with Brown whereby he had charge of all these leases?

A. Yes sir, he had them all in his charge.

Q. Did this company take that kind of a contract with Brown?

A. That he should have charge of them all? They had an understanding that he should look after them all.

Q. Who did he have that understand- with?

A. With Brown,—you had that understanding with him the same as anybody else.

Q. I asked you, did you understand that Mr. Ed. Brown had a contract with these several mining companies whereby he would have charge of all these mines and leases?

A. Well, he had possession of it, and he was in possession down there, we were trying to get him out.

Q. Then he didn't have any contract with these several mining companies, did he, to operate these several leases?

A. You know what he did, he was there, and you voted Bennett Brown's stock, and you helped to elect him director.

Q. Then you don't know whether Mr. Ed. Brown had a contract with these several companies to develop these leases?

A. They made no special contract with him.

Q. Or did the board of directors of these several companies make any special contract with him?

A. Not especially, that I know of.

Q. Then, if Mr. Brown was developing these several leases, he was doing it at his own option and with his own accord?

215 A. Well, I suppose he was.

Q. None of these other several mining companies sublet their leases to the Kansas & Texas Coal Company, except the Tulsa, did they?

A. No sir.

Q. That is, the contract with them was for only one mine and that was the Tulsa?

A. No answer.

Q. You wrote these cards, did you?

A. Yes sir, I wrote them.

Q. Now, I will ask you, don't you remember about receiving a letter from me, stating that these parties wouldn't carry out the contract, and pay the $4500, but were instructed to turn the stock over, and the stock was turned over to the Guthrie national bank, and if anything further was done, that you would have to make a new contract with them, and in substance that I would probably be at Ft. Smith in about two or three weeks and take the matter up with you if you were willing to take the matter up?

A. No sir, I didn't receive any such letter. I asked you to wire me, and I didn't receive a wire from you.

Q. New then, this card here, dated April 1, I will ask you what you meant by this?

A. I meant, I wanted you to wire me if you didn't want to take the stock.

Q. On March 29, what did you mean by this "Why don't you let me hear from you. J. T. Nelson"?

A. I wanted to know what you were going to do.

Q. Now then, on April 1, 1900, what did you mean by this "Wire me if you are not going to be here on the first"?

A. I think I got a wire from you on April 1st.

216 Q. Now, I asked you what did you mean by this, by writing this letter, if you hadn't received information from me to that effect?

A. I received one letter from you dated the 27th, that is the only one I received from you.

Q. That letter didn't say anything about me going to Ft. Smith, did it?

Objected to as not the best evidence—sustained.

Q. "Wire me if you are not going to be here on the first" what did you mean by that?

A. That is in reply to your letter.

Q. Isn't it a fact that you got a statement, one or two letters from me between March first and the last, that I would be there about April 1st?

A. No sir.

Q. Then, what did you ask me this question for then "Wire me if you are not going to be here on the first"?

A. Well, I had written you and Mr. McNeal that I wanted that stock back there on March 4th, or the money, and I wanted to let you know, and I have got the reply from Mr. McNeal, and he didn't say whether he was going to send it or not; I write you immediately and asked you what they were going to do about it, and I wrote that card one day and the next card there the next. I wanted to know before March 1st.

Q. But this card here, I will read this now: "Wire me if you are not going to be here on the first" J. T. Nelson" Now, isn't it a fact,—don't you remember getting a letter from me, stating that I would be there about April first?

A. No sir, the last letter is here that I got from you.

Q. And the only one?

217 A. And the only one, I might have had some letters from you two or three months prior to that time, but I have no recollection of them.

Q. What do you mean by this letter dated March 29: "Why don't you let me hear from you. J. T. Nelson." What did you mean by that letter?

A. I don't remember,—March 29?

Q. This is the letter here that you received from me, dated the 27th?

A. Yes sir.

Q. That doesn't say I will be there April 1st, does it?

A. No.

Q. Now, do you know how you got the idea I would be there April the first, if I hadn't written you?

A. You say you will be there in a few days—I don't know that I had any idea you would be there April 1st.

Q. Examine this card.

A. I don't know.

Q. Now then, in answer to that card, didn't you receive this telegram?

A. I think I did.

Q. Now, will you read it?

A. "Guthrie, Oklahoma, April 1. To J. T. Nelson, Ft. Smith, Arkansas. After the 20th I can be there; stock to-day expressed you."

Q. Now, Mr. Nelson, you were notified by the express company that that stock was there for you at Ft. Smith, wasn't you?

A. I think so.

Q. You declined to receive it, didn't you?

A. Yes sir.

Q. Then you wrote this other letter, stating that you had declined?

218 A. Yes sir.

Q. That you wouldn't accept?

A. Yes sir.

Q. You don't know how you got the idea that I would be there on the first?

A. No, I don't, unless it is in reply to that telegram; I must have written that card after receiving that telegram; I don't know how else I would have known it.

By Mr. HORNOR: You stated as I understood you when Judge De Bois asked you why you inquired in that card if he would be there on the first, it was because he had written that he would be there on the first in that letter, is that correct?

A. I don't remember just exactly how, Mr. De Bois had been writing me previous to that about other matters.

Q. Didn't you state in answer to Judge De Bois's question that that was the reason why you fixed it the first?

A. I don't remember what I stated now.

Q. I see you underscored the word "first" there in that card, you say you can't now tell why you fixed that date?

A. No sir.

Q. And you don't remember whether you answered the way I have stated or not?

A. No sir.

By Mr. BIDDLE: After you made this contract on May 28, 1900, what, if anything, did you do in reference to complying with the terms of that contract as to the property of the company, the books, etc., what did you do?

A. I sent them all here.

Q. From where?

A. Ft. Scott.

Q. How?

219 A. By express.

Q. To these parties?

A. Yes sir.

Q. To Mr. McNeal?

A. I think they were addressed to him.
Q. And shortly thereafter, as soon as you returned to Ft. Scott?
A. Yes sir.
Q. What property did you send?
A. I sent all the seals of the company and the records and the stock, I think I left all the stock here, or a greater part of it any way.
Q. You sent all that was covered by this contract?
A. Yes sir, the books——
Q. You sent these opinions, or did you leave them?
A. I left the opinions, I brought the opinions down with me when I come.
Q. Now, on or about March 4th, did you have any option or any contract with any one in reference to other stock belonging to this company?
A. Yes sir.

Objected to as immaterial, which objection was by the court sustained.

Q. Now, Mr. Nelson, I want to call your attention to this paper marked Exhibit "U," and to ask you to state who executed that paper, who signed it?
A. The chief of the Creek nation.
Q. What is his name?
A. Isparacher.
Q. Was a similar certificate of this character to each one of these leases?
220 A. Yes sir.
Q. Did you deliver a certificate of this character to the defendants?
A. Yes sir.
Q. Did they see one of these on the day this contract was made?
A. They saw them all.

Here the same is offered in evidence as Exhibit "U," and there being no objection, the same is as follows:—

EXHIBIT "U."

OKMULGEE, IND. TER., March 18th, 1898.

I hereby certify that the terms and conditions of this lease of the Wewaka Coal and Mining Company have been fully complied with by the lessees and their successors by the development of the coal and payment of royalty.

Witness my hand and the great seal of the Muscogee Nation the date and year above written.

ISPARHECHER,
Prin. Chief, Muscogee Nation.

D. C. WATSON,
Priv. Sec'y.

[Great Seal of the Muscogee Nation, I. T.]

I will ask you Mr. Nelson, whether the proceedings of the board of directors as recorded in these books, were alike in each one of these coal companies.

A. Yes sir.

Q. I will ask you also whether the terms of the leases of each of these ten companies are alike?

A. Yes sir.

By Mr. DE BOIS: Now, as a matter of fact, doesn't the Tulsa Coal Mining Company contain some entries and records that the other leases does not?

221 A. Only as to the amount of royalty.

Q. And also doesn't it show something in regard to that lease to the Kansas & Texas Coal Company—I understand it is with the exception of the royalty that was paid after the lease made with the Kansas & Texas Coal Company?

A. That is the only one that was sub-leased.

Q. With the exception of *they* are they also the same?

A. All the same.

By Mr. HORNOR: These charters are what you call leases, aren't they?

A. Yes sir.

By Mr. DE BOIS: Now then, is it not a fact that after close examination of these matters, that these charters, and the charter of the coal and mining company has one entry that none of the others have, and that is this, "That said lease and the charter has been extended one year from March 19, 1897?"

A. That is in every lease there is there.

Q. Isn't it a fact that all the balance of the other leases is extended from March, 1897?

A. Well, they are extended two or three years, and they are identically the same.

Q. I will ask you to examine this, what lease is that?

A. The Red Fork.

Q. Will you please state from what time was that extended?

A. Well, there is two or three extensions here.

Q. The last extension?

A. The last extension was the one just had here, what date was that.

Q. Well now, I will ask you if there isn't this difference between the Tulsa Coal and Mining Company and these others, that the Tulsa Coal and Mining Company has this endorsement "Ex-

222 tended one year from March, 1897," and the other was extended from March, 1896?

A. Was that the Tulsa extended from March, 1896?

Q. I will ask you if this wasn't extended from March, 1896?

A. Not March 1896, March, 1897.

Q. Where is that endorsement?

A. I have got it there somewhere, the leases were made in March, 1896; here is the endorsement, extended from March, 1896.

Q. What is that lease?

A. The Tulsa.

Q. Will you show wherein these other leases were extended from March, 1897, except the Tulsa lease?

A. Yes sir, here it is, "Extended one year from March 17, 1897." Here it is on this one "Extended from March 18, 1897."

Q. Now then, I will ask you this question, Is there any other endorsement showing that they were extended from March, 1898?

By the COURT: They will show what is on them.

By Mr. BIDDLE: I desire to make an offer of one of these leases and one of these books. Let this be understood, that we introduce the Tulsa lease, the Tulsa records, and if counsel in the argument point out any difference between them and the others, that that matter be noted, and if either party desires to incorporate it in the record, let it go in.

By Mr. DE BOIS: Well, let the Tulsa lease and record go in on its own merits, and they will let any one of the other nine go in.

By Mr. BIDDLE: All right.

The same is as follows:

223 Charter of the Tulsa Coal and Mining Company.

We, the undersigned citizens of the Muscogee Nation to wit: George B. Perryman, Henry Perryman and Mose Perryman, do hereby associate ourselves together for the purpose of developing the coal interests of the Muscogee Nation; and for the purpose of obtaining skilled labor and capital for the development of the coal interests of the Muscogee Nation, we do hereby associate with us, Chas. E. Douglass and Joseph H. Richards, and all citizens of the United States of America, whereby we and all of us do hereby associate ourselves together as a body corporate for such purpose, known and to be known and named the Tulsa Coal and Mining Company, and we do hereby ordain, enact and adopt the following articles of incorporation.

1st. The name of this corporation shall be the Tulsa Coal and Mining Company.

2nd. The object of this corporation shall be the development of the coal interest of the Muscogee Nation, and such other interests as may be necessary or proper in connection therewith.

3rd. The location where its mining operations are to be carried on shall be within the boundaries of the lands hereinafter described; with its offies at the town of Tulsa in the Muscogee Nation, and at such other place or places as may be necessary or convenient for the prosecution of its business.

4th. The amount of its capital stock shall be one hundred thousand dollars, and the number of its shares shall be one thousand divided into one hundred dollars each.

5th. The number and names of such incorporators shall be the persons, whose names and places of residence are as follows:
224 George B. Perryman, Tulsa, Muskogee Nation.
Mose Perryman, Tulsa, Muscogee Nation.
Henry Perryman, Tulsa Muscogee Nation.
Charles E. Douglass, Fort Scott, Kansas.
Joseph H. Richards, Fort Scott, Kansas.
who shall act as a board of directors until their successors are elected *and qualified as provided by law and the by-laws of said company.*

6th. The time of commencing business of said corporation shall be within one (1) year from this date.

7th. This corporation shall exist for the period of thirty years.

8th. The amount of coal land upon which the company intends to locate and which it intends to develope as speedily as practicable is evidenced by monuments and described as follows, to wit:

Commencing at a point where the north boundary of the Creek Nation crosses the St. Louis and San Francisco R. R., running here with said boundary line east to a point where the fourt- boundary post, from his place of beginning stands; thence running south to a point where a stone stands of the southeast base of the Broken Arrow Bald hills; thence west to Arkansas river, opposite mouth of Polecat creek; thence running up said river with the north bank to the crossing of the St. Louis and San Francisco R. R.; thence running with said railroad northeast to place of beginning.

Also hereby granting a right of way of two hundred (200) feet in width, or more if necessary, from any mine or mine-works, to any railroad depot or station. All of the above mining lands are
225 located between the Arkansas river north boundary of the Creek Nation in Coweta district covering the coal deposits in the Perryman coal department.

J. H. RICHARDS.
CHAS. E. DOUGLASS.
HENRY W. PERRYMAN.
MOSE PERRYMAN.
GEO. B. PERRYMAN.

STATE OF KANSAS, } ss:
County of Bourbon, }

Be it remembered that on this 4th day of March, 1896, before me a notary public, in and for said State, came Joseph H. Richards and Charles E. Douglass, to me personally known to be the same persons who executed the foregoing instrument, and duly acknowledged the execution of the same.

In witness whereof, I have hereunto subscribed my name and affixed my official seal on the day and year last above written.

[SEAL.]

GEO. O. BACON,
Notary Public, Bourbon Co., Kas.

My commission expires Aug. 6, 1899.

Q. Do you remember now on that trip whether either of the oth defendants were along?

A. I don't think they were.

Q. What year was that?

A. 1897, I reckon.

Q. As I understand you, none of these places that you had open on these leases, were in near enough proximity to a railroad to o erate, except the Sapulpa and the Tulsa lease?

A. Yes sir.

Q. And you informed these gentlemen that?

A. Yes sir.

Q. Now, Mr. Nelson, did you ever receive any other letter or te gram or notice of any character, verbal or written, from either these defendants, or from Mr. De Bois, except those that you ha shown here, between the 25th day of February, and the last day March, 1901?

A. I received the letter from Mr. McNeal, dated the 27th of F ruary, and one from Mr. De Bois——

Q. No, no, you don't understand my question,—I will

204 you what letters you ever received?

A. I only received two, one from Mr. McNeal and one fr Mr. De Bois.

Q. I will ask you to state Mr. Nelson if you received this let dated February 27, 1901, and signed by Mr. De Bois?

A. Yes sir.

Here the same is marked Exhibit "S" and offered in evide and there being no objection the same is admitted, and is as follo

EXHIBIT "S."

GUTHRIE, O. T., 2/27, 190

J. T. Nelson.

DEAR SIR: Yours to McNeal and noted our company has d nothing yet in way of having anything definite fixed as to the leases. I will be over to you- town in a short time and see you

J. D. DE BOI

Q. Did you receive any other letter from Mr. De Bois except one marked Exhibit "S" after the 25th day of February, 1901, the last day of March, 1901?

A. No sir.

Q. Did you receive any telegram from him during that time

A. No sir.

Q. When did you first hear from Mr. De Bois or from eith these defendants after the last days of March?

A. I think it was the first of April.

Q. Did you receive any letter from Mr. De Bois dated betwee first of March and the 4th of March?

A. No sir.

Q. You were at Ft. Smith during all that time, wasn't you?
A. Yes sir.
205 Q. Your home was there?
A. Yes sir.
Q. I mean at Ft. Smith, Arkansas?
A. Yes sir.
Q. Did you make a statement here on the 28th day of May, 1900, to Mr. Greer and these other defendants, that these leases were valid?
A. No sir, only so far as the attorneys' opinions went.

Cross-examination by Mr. De Bois:

Q. In regard to developing these other nine mines, and as to the Sapulpa mine, how far from Sapulpa is that?
A. Sapulpa is in one corner of the lease. How far is Sapulpa from the mine?
Q. Yes, how far is this mine?
A. The mine is about three miles and a half from Red Fork.
Q. That is the mine I believe you stated that there was a six foot vein of coal?
A. Yes sir, the deeper vein.
Q. How far from the railroad would that be?
A. About three miles and a half.
Q. Now, how much coal did you market from that mine?
A. Fourteen or fifteen cars.
Q. When did you take out that coal?
A. In the winter of 1897 and 1898.
Q. Now, how deep did you go for that coal?
A. Well, we commenced stripping where the covering wasn't over a foot and a half and went back possibly where it would get to be ten feet.
Q. How deep was the deepest test that you made there in that mine?
206 A. Well, we tested twenty or thirty feet, the deepest one was the deep well that was sunk there.
Q. How deep was that?
A. I don't know how deep the well was; the report that they had reached coal was 608 feet to the second vein.
Q. How much money did you expend in developing the coal on that lease?
A. I don't remember, there is a statement of it there, that is the $700.
Q. $789, is that correct?
A. Yes sir.
Q. How was this money expended?
A. My recollection was that we paid Mr. Weaver $225 for his report on that coal and the balance of the expenses in prospecting.
Q. And the other?

A. Was spent in digging prospect holes and opening up the strip-pits and boring.

Q. How did you manage to go down 600 feet, what kind of machinery did you have?

A. The Standard Oil Company was drilling on that lease for oil, or represented to be the Standard Oil Company, and a man by the name of Weaver had charge of it, and we paid him for the report on the coal.

Q. As a matter of fact that machinery was operated and that deep well of 608 feet was operated by the Standard Oil Company?

A. Yes sir.

Q. And you didn't contract to have that well dug?

A. No sir, we contracted for a report on the coal as the well went down.

Q. Just to give you the coal test is all?

207 A. Yes sir.

Q. How much did you pay them?

A. I think it was $225.

Q. That you paid them for the test?

A. Yes sir.

Q. Then, how was the other money expended?

A. I answered that once.

Q. How much coal did you take out of the——

A. I have forgotten now.

Q. —lease at Okmulgee?

A. We mined but very little coal at Okmulgee, forty or fifty tons at that place.

Q. You opened up a mine there?

A. Yes sir, we opened up two, one twelve miles from Okmulgee and one about seven.

Q. The Choctaw Coal & Mining Company was also in the Creek Nation, but that was south of the Choctaw railroad, or near the Choctaw railroad?

A. Yes sir.

Q. How far was that mine from the railroad?

A. The closest one we found was about eighteen miles from Holdenville.

Q. Did you market any there?

A. Very little.

Q. Now, in these other nine, Mr. Nelson, out of how many of the mines did you market the coal from?

A. We marketed the coal from three.

Q. Which three?

A. That was the mine at Okmulgee and the Sapulpa and the Tulsa mine.

Q. What was the royalty that you paid to the Creek Nation?

208 A. Five cents a ton.

Q. Did you pay them anything outside of the five cents a ton?

A. No sir.

Q. Now then, the mines that you got no coal out of, what did you pay on them to the company?

A. To what company?

Q. To the Creek Nation, I mean?

A. I paid nothing.

Q. Then as a matter of fact——

A. We did the developing work on them.

Q. —with the exception of three, you didn't pay any royalty at all to the Creek Nation?

A. No sir.

Q. Now, this list, Mr. Nelson, that you have here, is the statement made by you as secretary of the several coal companies made to the treasurer of the Creek Nation?

A. Yes sir.

Q. You made this?

A. Yes sir.

Q. Where did you meet this man Childers at the time he signed this?

A. I think it was in Wagoner.

Q. Now, I will ask you whether he had been at these various mines while you were operating them?

A. Yes sir.

Q. At what time?

A. He was there at various times; I used to see him every month in Okmulgee when I paid the royalty.

Q. You met him at Wagoner at the time he signed this?

A. Yes sir.

209 *A. Yes, sir.*

Q. You prepared this list, and you had it with you and handed it to him and he examined it, did he not?

A. Yes sir, he was up to the companies' offices prior to that time and went over the records.

Q. At Ft. Scott?

A. Yes sir. He went over the account of each lease; we keep a separate account of each lease, just the number of days that we worked on it and the number of men we worked and the number of teams we worked and the amount that was paid.

Q. He examined the records there, did he and from that he certified to this?

A. Yes sir.

Q. I will ask you now Mr. Nelson, didn't you claim that you had spent about fifty thousand dollars in developing these various leases, one way and another?

A. No sir, I never claimed we spent that much.

Q. About how much?

A. About thirty thousand dollars.

Q. Now, in what way was that spent?

A. Part of that was spent on that railroad and the other was

spent in the development and expenses of these coal companies in 1896.

Q. Isn't it a fact that one of these letters you exhibited, stated that you had spent about fifty thousand dollars in developing these mines?

A. Not that I had spent that much or the companies didn't; there had been about that much spent but the companies hadn't spent that much.

Q. I understand you to say now that your companies spent
210 about thirty thousand dollars?

A. Yes sir.

Q. Now, how did they expend that?

A. Part of it is accounted for in that statement you have there, and we spent quite a bit on the survey,—started to survey from Guthrie out here, and had eighteen men down in the Creek Nation surveying for several months, and part of it was paid on that railroad and various other expenses attached to the company.

Q. Now, isn't it a fact that the money that was expended on that railroad was all furnished by Mr. Brown and Mr. Parker?

A. No sir, it wasn't.

Q. Did any of these mining companies furnish Mr. Brown any money to grade that railroad or lay the culverts?

A. Yes sir, we did.

Q. How much?

A. I don't remember just how much.

Q. Now, I will ask you did this company make a contract with Mr. Brown for the purpose of grading that roadbed?

Objected to as immaterial, which objection was by the court sustained.

Q. Isn't it a fact that the Guthrie Club here paid the money for that survey?

Objected to as incompetent, irrelevant and immaterial, which objection was by the court overruled.

A. I don't know what the Guthrie Club paid for; but I know I have receipts from Mr. Steincourt and Mr. Anderson, the engineers, for eighteen men that they had in the Creek Nation for several months that we paid them, I don't know what you paid.

By Mr. HORNOR: Didn't you go over there on that trip with Mr. Guss and Mr. Gray here and J. M. Brooks, isn't that the time you went over there?

211 A. Yes, I believe it was.

Q. Don't you know that the Guthrie Club raised about $1500 here for the purpose of putting on a survey here?

A. They had been working a long — previous to the time I come to Guthrie, in the Creek Nation.

By Mr. DE BOIS: You were here with Mr. Brown at the time?

A. I was here several times with Mr. Brown.

Q. At the time you went with Mr. Gray, Mr. Brown was here also, wasn't he?

A. I think so.

Q. You were present at the Commercial Club here at the time Mr. Brown made statements in regard to that road, wasn't you?

A. Yes sir.

Q. Now isn't it a fact that Mr. Brown then and there in your presence, stated to the people of Guthrie that he had eleven miles of road graded, and that he was coming to Guthrie with that road, and that he wanted the people of Guthrie to assist him by raising fifty thousand dollars to give him?

Objected to as incompetent, irrelevant and immaterial, which objection was by the court sustained.

Q. Isn't it a fact that under your leases with the Creek Nation, that you were required to commence work there within one year from the date of your charter?

A. That was a part of the laws of the Creek Nation that we should, but the lease says that each year that we expended money and the work done, and we complied with that law in every sense of the law, and it was recorded there, the council acknowledged it, and the records are made of every dollar expended, in Okmulgee, and the last endorsement there shows that the Creek council were satisfied with it, that we had acted in good faith and spent money on it and gave a final endorsement on this lease.

212 Q. Then you had kept these leases alive up to the time of the Curtis act?

A. With the Creek council, but we couldn't pay royalty on the leases, we couldn't operate, but we could spend money on it.

Q. I say, you kept these leases alive up to the time of the Curtis act?

A. That was always the understanding that we had.

Q. Isn't it a fact that some of this money you say you expended, was expended in prospecting and not in mining coal at all, but just around in looking over the country?

A. Around looking for coal, we followed the croppings.

Q. That is in this means you had just spent that money in prospecting and in developing no coal at all, or digging around to see where there was any coal, isn't that a fact?

A. Yes sir, that is generally so, we would dig holes that you could go down and see the coal, not only auger holes, but prospect holes.

Q. Isn't it a fact that nearly all this money set out in this certificate was spent in going around making prospect holes rather than in getting coal and developing the mines?

A. There was a great deal more money spent than that in getting coal, that was just the work expended on these mines before we commenced operating the coal.

Q. Former question read.

Brown was duly elected to fill these vacancies. The following resolution was voted upon and adopted:

"I-E."

Resolved by the board of directors of the Tulsa Coal and Mining Company That the president of this company, attested by the secretary, is hereby authorized to lease the property of this company to B. F. Hobart of St. Louis, Mo., and his associates, on the following terms and conditions. Said lease shall be for a term not to exceed five years and to take effect and be dated May 1st, 1898. Said Hobart shall commence the mining and shipping of coal immediately after this contract goes in effect and pay to this company ten cents (10) per ton for each and every ton of coal mined from this company's property. Said royalty to be paid on the 20th of each and every month for all coal mined the preceding month. And it is expressly agreed and to be made a part of this contract, that in the event that the present rate of royalty, *i. e.* 5 cts. per ton that has to be paid the Creek Nation, is in any way changed during the time of this contract, that the said Hobart and his associates agree to pay a sufficient amount of royalty to net this company 5 cts. per ton for all coal mined over and above the royalty this company has to pay the Creek Nation. It is to be a part and consideration of this contract that all improvements of whatsoever nature that is required for the farther development of this property during the terms of this lease shall be made at the expense of the said Hobart and his associates and at the expiration of this lease, all improvements, such as buildings, sidetracks, switches, scales, etc., shall remain the property of the said Hobart and his associates, provided all royalties have been paid by the said Hobart and his associates as herein outlined.

235

No farther business before the board. Meeting adjourned subject to call.

FORT SCOTT, KANS., 2-21st-1899.

Meeting of the board of directors of "The Tulsa Coal & Mining Co." called by J. T. Nelson, secretary.

Present: J. T. Nelson and C. C. Nelson.

The resignation- of Jas. A. Bolen—Bennett Brown and E. H. Brown as directors of this company were accepted. Thereupon the members of said board duly elected Peter Dalrymple, Alex. McDonald and W. R. Biddle, (all stockholders) as directors to fill such vacancies.

236

Peter Dalrymple, Alex. McDonald, W. R. Biddle, J. T. and C. C. Nelson all being present, the resignation of E. H. Brown as president of this company was accepted and W. R. Biddle duly elected president and Peter Dalrymple elected vice president.

It was moved and seconded that C. C. Nelson as treasurer of this company should give bond in the sum of $5000.00.

Meeting adjourned to meet again Monday night, February 27th, 1899.

At a meeting of the board of directors of the Tulsa Coal and Mining Company at Fort Scott, Kansas, on May 10th, 1899, the following proceedings were had:

On motion W. R. Biddle, president, was authorized to settle all matters with the Kansas and Texas Coal Company; adjust and receive all accounts and moneys due the company from the said coal company, and receipt for same, and make any arrangements with the said Kansas and Texas Coal Co. he may deem prudent; also to make any arrangement with the Frisco road for the development of this lease that he may deem proper and to enter into contract to carry out same.

Witness my hand and seal of said Tulsa Coal and Mining Company this 10th day of May, 1899.

[SEAL.] J. T. NELSON, Secretary.

237 W. R. Biddle, president, called a meeting of the board of directors of the Tulsa Coal and Mining Company, at 10:30 o'clock a. m. May 10th, 1899, at its office in Fort Scott, Kansas. Board present.

On motion W. R. Biddle, president, was authorized to settle all matters with the Kansas and Texas Coal Company; adjust and receive all accounts and moneys due the Co. from said coal Co. and receipt for the same and make any arrangements for developing this lease with the Frisco road that he may deem proper and to enter into contract to carry out same.

Meeting adjourned subject to call.

J. T. NELSON, Secretary.

FORT SCOTT, KANSAS, Jan. 2nd, 1900.

Proceedings of the regular annual meeting of the stockholders of the Tulsa Coal and Mining Company, held at Fort Scott, Kansas, 1-2-1900. Meeting was called to order by W. R. Biddle, president.

The following stock was represented by the stockholders present or by proxy:

Bennett Brown, by E. H. Brown, proxy, 250 shares
John D. De Bois, for himself, *et al.*, 250 shares
Peter Dalrymple, for himself, *et al.*, 300 shares
J. T. Nelson and E. H. Brown, rep. the balance of the stock; the same being all of the stock except 100 shares not represented. The stockholders proceed to elect a board of directors with the following results.

E. H. Brown, John D. De Bois, J. W. McNeal, C. H. Kimball and J. T. Nelson. With the election of the above named directors for the ensuing year, the stockholders' meeting adjourned.

238 FORT SCOTT, KANSAS, 1/2/1900.

Following the adjournment of the stockholders' meeting of the Tulsa Coal and Mining Company, the newly elected board of direct-

ors held their first meeting for the election of new officers, with the following results:

E. H. Brown, duly elected president.

John D. De Bois, duly elected vice president.

J. W. McNeal, duly elected treasurer.

J. T. Nelson, duly elected secretary.

There were present, E. H. Brown, John D. De Bois, C. H. Kimball and J. T. Nelson.

Meeting adjourned subject to call as provided by the by-laws.

OKLAHOMA CITY, O. T., June, 1900.

At a meeting of the board of directors, held at the Grand Avenue hotel, this date, by a call made by the president, the following directors were present. E. H. Brown, director and president; Joe McNeal, director and treasurer; John D. De Bois, director and vice president; J. T. Nelson, by proxy, director and secretary.

The resignation of J. T. Nelson, director, in writing, was offered, wherein he resigned as secretary and director of this company, was accepted by the board, and U. C. Guss, elected to fill the vacancy, as director and secretary. This meeting being presided over by E. H. Brown, president. John D. De Bois, directed to make minutes of this meeting.

JOHN D. DE BOIS,
Acting Secretary for this Meeting and Vice President.

239 W. R. BIDDLE, a witness for the plaintiff, being called and sworn, testified as follows:

Direct examination by Mr. GREEN:

Q. State your name?

Q. W. R. Biddle.

Q. Where do you live?

A. Ft. Scott, Kansas.

Q. Have you ever sustained any relation to these mining companies?

A. Yes sir.

Q. What?

A. I was director and president for I think about one year.

Q. Were you present at the office of the company in Ft. Scott, Kansas in the summer of 1899 when any of these defendants in this case came there and examined into these mines or these corporations?

A. Yes sir.

Q. What took place—just state who came there?

A. Mr. Guss and Mr. Greer came there.

Q. What took place?

A. They came there and I was called from my office down to the office of these companies, and they stated there that they had ob-

tained $250,000 face value of the shares of these companies, and were anxious to know the status of these companies; of course, I can't remember the exact language, but I am speaking the substance of it. Joe Nelson was there and his brother, C. C. Nelson, if I remember, was there most of the time. His office consists of two rooms and Mr. Nelson was in and out. These papers were in the safe in the inner office and were taken out of there and placed on a table.

Q. What papers were exhibited to them there?

240 A. These records of the companies, these leases, the opinion of Mr. Richards and Mr. Perry and my own opinion in writing were exhibited, as I remember, and also this correspondence, this letter that I wrote to the Secretary of the Interior and his reply.

Q. Was Senator Baker's opinion also exhibited?

A. I don't remember distinctly as to that, but all of the papers together were exhibited. I remember distinctly of Mr. Perry's and Mr. Richards'.

Q. Do you remember how long those gentlemen remained there, Mr. Guss and Mr. Greer?

A. Oh, they were there several hours I think in the office.

Q. How long did you remain there?

A. Well, that is the time that I remained there.

Q. Now, did you ever have any subsequent conversation with these gentlemen?

A. I never had any further conversation with these gentlemen except with Mr. De Bois.

Q. When was that, Judge?

A. That was on January 2nd, as this record shows, I don't remember independent of the record, 1900.

Q. What took place then?

Objected to as incompetent, irrelevant and immaterial, which objection was by the court overruled, to which the defendants excepted.

A. At that time a board of directors was elected, and there was quite a contest; the ballots were even for a number of ballots—and Mr. Kimball was there from Parsons, and Mr. De Bois representing the shares of these defendants, and I was there as the president of the company, I had no shares myself, and there was quite a contest, but finally the Guthrie fellows got three of the directors

241 elected, Mr. De Bois, Mr. McNeal and Mr. Kimball, they got the three that were friendly to them elected.

Q. And did you have any subsequent conversations with these defendants?

A. There the matter was all talked over in reference to who was then in control of the company. Ed. Brown was president of the company and was again elected on that day, and he had charge of the mines under this Missouri, Kansas & Texas lease.

Q. Was Col. Ed Brown there that day?

A. He was there.

Q. Did he make any report?

A. He made a verbal report, but Col. Ed. Brown was a regular enigma, you never could find him, and he was asked about the output of the mine, I don't remember what he said, but it was very unsatisfactory to everybody. At that time he was operating the mine, representing the company and also the M. K. & T.

Q. Was he also representing the Kansas & Texas Coal Company?

A. I mean the Kansas & Texas Coal Company, not the M. K. & T.

Q. Now, did you have any conversation with any of these defendants after this, Judge?

A. I have no recollection of ever meeting them afterwards; I considered the correspondence, that is, some correspondence with Mr. McNeal, I wrote him this letter which is introduced in evidence, wrote him a number of letters.

Q. You say at one time you were president of the company?

A. Yes sir, I was president then.

Q. How long were you president?

A. I was president from some time early in 1899 to the second day of January, 1900.

Q. Then Col. Brown succeeded you as president?

A. Col. Brown succeeded me.

242 Q. During the time you were president, did you have any active management of the company?

A. No sir.

Q. Who had?

A. Col. Brown.

Q. Did he ever make any report while you were president?

A. He made no report.

Q. Was there any effort made to get him to make a report?

A. We did all we could——

Objected to as immaterial, which objection was by the court sustained.

Cross-examination by Mr. DE BOIS:

Q. Now at that meeting, I will ask you if it isn't a fact that Mr. Nelson and myself—I will ask you who is Mr. Peter Dallrimple, who is he?

A. He was a miller living in Ft. Scott there.

Q. Now, was he friendly with you and Mr. Nelson in the election, or was he against you?

By the COURT: That is immaterial.

A. That maybe as far as that is concerned.

Q. I thought we fought Kimball?

A. Yes, that is possible, but I know that your faction won; I may be mistaken as to the persons that were friendly to you.

J. T. NELSON, recalled by the plaintiff for further examination, testified as follows:—

By Mr. BIDDLE:

Q. Calling your attention to Exhibits "J" and "K," the two cards, were those cards written by you in reference to this transaction between you and these defendants?

Objected to as leading and suggestive, which objection was by the court sustained, to which the plaintiff excepted.

Plaintiff moves to exclude from the evidence these two
243 cards, for the reason that they are incompetent, which motion was by the court overruled, to which the plaintiff excepted.

Q. I will ask you whether you had made any arrangements during March, 1901, in reference to the claim that you had against these defendants,—what did you do after the 4th of March?

Objected to as immaterial——

Q. I will ask you the direct question, whether those cards were written to him in reference to any business connected with these defendants?

Objected to as leading, which objection was by the court sustained.

Q. For what purpose did you write these cards?

A. Well, I don't remember exactly what I did write them for.

Q. Well, was it in connection with any transaction that you had between yourself and these defendants?

Objected to as incompetent, irrelevant and immaterial and leading, which objection was by the court overruled, to which the defendants excepted.

A. No sir.

Q. Now, I will call your attention to the 28th day of May, 1901, do you remember of Mr. Greer examining the opinion of Senator Baker in reference to the validity of these leases?

A. 28th day of May?

Q. Yes, the time this contract was written.

A. No, he examined it when he was in Ft. Scott, we had all the opinions here on that day.

Q. Did Mr. Greer in that conversation say anything about that opinion?

A. Yes sir.

Q. What did he say?

A. He said he was perfectly satisfied with it, that he knew
244 Senator Baker, and took his word in preference to any of the others he had read.

By Mr. BIDDLE: The plaintiff offers in evidence—we haven't got it here, unfortunately, the laws of the Creek nation, so far as they

effect the leasing of lands in the Creek reservation, and we also offer in evidence the treaty between the United States and the Creek nation, by which the Creek reservation — obtained; I presume your honor would take judicial knowlege of that fact, but I don't know, because the treaty is one of the laws of the land. The only object I have in introducing that is, I noticed when I examined it here, the word- " fee simple,"—that this title was conveyed to the Creek nation in " fee simple "

By Mr. HORNOR: I don't know what the Creek laws are, I haven't seen them, but I will object to them——

By the COURT: They would have to be proven, whatever they are, if the court gives them any consideration.

By Mr. BIDDLE: If counsel don't want them in, I will withdraw the offer.

By Mr. HORNOR: I will withdraw my objection to the offer——

By Mr. BIDDLE: I will read the treaty to the court.

By the COURT: Do I understand the Creek laws are introduced or not?

By Mr. BIDDLE: I have no desire to renew the offer now.

The plaintiff here rests.

245 U. C. GUSS, being called in rebuttal, testified as follows:

By Mr. DE BOIS:

Q. At the time that you and Frank Greer were up to Ft. Scott, and went in at Mr. Biddle's office and Mr. Nelson's and had a talk with them, I will ask you did you examine the leases and records there and endorsements on the leases that pertained to these leases?

A. No sir, I don't think I ever saw any endorsement on the leases until here in court yesterday, but I looked over them to see what they were.

Q. Did you go into the examination of those leases and records?

Objected to as immaterial, which objection was by the court overruled.

Q. I will ask you for what purpose was you at Ft. Scott and Mr. Greer.

A. We went down there for the purpose of looking after the collection of the amount of money due from Mr. Brown and Mr. Parker.

Q. Who did you go there to see?

A. We went there to see Mr. Brown and Mr. Parker.

Q. How come you to Mr. Biddle's and Mr. Nelson's offices?

A. When we were down there, we went over to Mr. Nelson's office primarily to find out where—we were expecting to meet them there, and they weren't there, and then the question of these leases came up and the question under debate was over the opinion of these attorneys as to the legality of these leases. The records were there, Mr. Nelson said " There they all are."

Q. When was that, Mr. Guss, as near as you can state?
A. That was quite a time before that foreclosure of that road-bed.
246 Q. As much as six or twelve months before this purchase?
A. Well, I don't know, it was before the beginning of the proceedings of foreclosure on that.
Q. I mean the last purchase of the stock of Mr. Nelson's stock.
A. Oh yes, it was prior to that.
Q. How long, do you think, prior?
A. It must have been from six months to a year before that.
Q. Had you been sent there by any of these stockholders of this purchase, for the purpose of investigating?
A. No sir, I hadn't,——

Objected to as immaterial and incompetent, which objection was by the court overruled, to which the plaintiff excepted.

A. Mr. Greer and I were in Chicago together, and coming home we agreed to go down there and look after the collection of that debt, that is what we went there for.
Q. What debt?
A. The debt of Brown and Parker's.
Q. Who were they owing? (By the Court)
A. They were owing six of us here.
By Mr. De Bois: Then you were there on another business all together, you were there collecting a debt of Mr. Brown and Mr. Parker?
A. Yes sir, a debt he owed to Spurlock, Greer, Gray, McNeal, De Bois and myself.
Q. Then Mr. Greer and you while in Chicago, concluded among yourselves that you would go around that way and see Brown and Parker, and went to Ft. Scott to see them?
A. Well, yes, that is the way we came; I think I possibly told Mr. McNeal before we went that we would come around that way if we could.
247 Q. And then you weren't there for the purpose of examining the records pertaining to these mines or stocks or anything of that kind?
A. Not only so far as it concerned the stock that we held as collateral to that loan; it had nothing to do with this alleged purchase at all.

Cross-examination by Mr. Biddle:

Q. Are you sure that it was before the foreclosure?
A. Yes sir, I am quite certain it was.
Q. Do you remember the date of the foreclosure?
A. No sir, I do not.
Q. Don't you remember that it was some time in the latter part of the summer of 1899 or fall of 1899?

UNITED STATES OF AMERICA,
Northern District, Indian Territory.

Be it remembered that on this 14th day of March, 1896, before me a notary public in and for said northern district personally came Geo. B. Perryman, Mose Perryman and Henry Perryman who subscribed the foregoing instrument and acknowledged that they had signed the same for the consideration and purpose there stated as their free voluntary act and deed.

Witness my hand and notorial seal the day and date last above mentioned.

[SEAL.]

E. CALKINS,
Notary Public.

Commission expires April 26, 1898.

226 The above and foregoing charter is hereby approved by me this the 19 day of March, A. D. 1896.

I. SPARHECHER,
Principal Chief M. N.

Attest:

[SEAL.] J. H. LYNCH,
Act'g Priv. Sec'y.

I hereby certify that the within and foregoing charter of the Tulsa Coal and Mining Company is a true and correct copy of the original articles of incorporation of the said company now on file in the archives of the Muscogee Nation as provided by law.

The said charter has been extended one year from March 19th, 1897.

Witness my hand and the great seal of the Muscogee Nation this the 10th day of March, 1897.

ISPARHECHER,
Prin. Chief M. N.

J. H. LYNCH,
[SEAL.] Act'g P. Sec'y.

I hereby certify that the above and foregoing charter of the Tulsa Coal and Mining Co. is a true and correct copy of the original articles of incorporation of the said company now on file in the archives of the Muscogee Nation as provided by law.—Said charter has been extended one year from March 19th, 1897.

ISPARHECHER,
Principal Chief M. N.

J. H. LYNCH,
[SEAL.] Act'g Privt. Sec'y.

Charter of the Tulsa Coal & Mining Co.

227 All rights, title and interest in the above mentioned charter of the Tulsa Coal and Mining Company (Record page 181) have been duly sold as per the following articles of assignment:

FORT SCOTT, KANSAS, May 11th, 1896.

Whereas, Charles E. Douglass, Geo. B. Perryman, Mose Perryman, and Henry Perryman, together with Joseph H. Richards are the incorporators of the Tulsa Coal and Mining Company, and are the owners of and are entitled to all the shares of the capital stock of said corporation; which said stock has not yet been issued by said corporation or delivered to said corporators, and, whereas, the said incorporators have sold their entire interest in said corporation to J. A. Bloen, E. K. Criley, Bennett Brown and J. T. Nelson; now, therefore, this agreement witnesseth: That the said Charles E. Douglass, Geo. B. Perryman, Mose Perryman and Henry Perryman, together with Joseph H. Richards, in consideration of the sum of five thousand dollars ($5000.00) do hereby sell, transfer, assign and deliver to J. A. Bolen, E. K. Criley, Bennett Brown and J. T. Nelson, all of their interest in the capital stock of said corporation and do hereby request and authorize said corporation and its officers to issue and deliver to the said J. A. Bolen, E. K. Criley, Bennett Brown and J. T. Nelson, all shares of the capital stock of said corporation and to hold this agreement or a copy thereof as its and their warrant for the issue and delivery of said stock to J. A. Bolen, E. K. Criley, Bennett Brown and J. T. Nelson instead of to said incorporators.

Witness our hands this 11th day of May, 1896.

CHARLES E. DOUGLASS.
GEO. B. PERRYMAN,
By CHARLES E. DOUGLASS,
As Att'y in Fact.
MOSE PERRYMAN,
By CHARLES E. DOUGLASS,
As Att'y in Fact.
HENRY PERRYMAN,
By CHARLES E. DOUGLASS,
As Att'y in Fact.

(E. E. BAYLESS AND
MARK PINKSTON,
Witnesses.)

228 Chas. E. Douglass first being duly sworn, stated that the names subscribed to the foregoing instrument are the same parties whose names appear in the body of this instrument, and that he is the att'y in fact and duly authorized to execute the same. And that he also executes the same as his free and voluntary act for the purposes therein specified for himself, as well as for those he represents by power of att'y as above stated.

CHARLES E. DOUGLASS.

Subscribed and sworn to before me, a notary public, in and for Jackson county, Missouri, this 14th day of May, 1896.

JOHN P. GILDAY,
Notary Public.

[SEAL.]

My commission expires September 22nd, 1897.

FORT SCOTT, KANSAS, May 11th, 1896.

Whereas, J. H. Richards, together with Charles E. Douglass, George B. Perryman, Mose Perryman and Henry Perryman are the incorporators of the Tulsa Coal and Mining Company, and are the owners of and entitled to all the shares of the capital stock of said corporation, which said stock has not yet been issued by said corporation or delivered to said incorporators, and whereas said incorporators have sold their entire interest in said corporation and in said stock, to J. A. Bolen, E. K. Criley, Bennett Brown and J. T. Nelson, now, therefore, this agreement witnesseth: That the said J. H. Richards, together with Charles E. Douglass, George B. Perryman, Mose Perryman and Henry Perryman, in consideration of the sum of five thousand dollars ($5000.00) do hereby sell, transfer, assign and deliver to J. A. Bolen, E. K. Criley, Bennett Brown and J. T. Nelson all of their interest in the capital stock of said corporation and do hereby request and authorize said corporation and its officers to issue and deliver to J. A. Bolen, E. K. Criley, Bennett Brown, and J. T. Nelson, all shares of the capital stock of said corporation and to hold this agreement, or a copy thereof, as its and their authority for the issue and delivery of said stock to J. E. Bolen, E. K. Criley, Bennett Brown and J. T. Nelson, instead of said incorporators.

229

Witness my hand this 11th day of May, 1896.

J. H. RICHARDS.

Attest:

G. D. PERRIGO.

(The above are true copies of the originals.)

J. A. Bolen, E. K. Criley, Bennett Brown and J. T. Nelson, all the parties now interested in the above mining corporation, being present on this the 19th day of May, 1896 in Kansas City, Missouri, subscribed for stock in the Tulsa Coal and Mining Company as per amounts opposite their respective names.

Jas. A. Bolen	250 shares
E. K. Criley	250 shares
Bennett Brown	250 shares
J. T. Nelson	250 shares

Said shares to be of the par value of $100.00 each and representing the entire capital stock of said corporation.

SPECIAL NOTE.—In consideration of $1.00, the receipt of which is hereby acknowledged, it is mutually agreed by all parties interested

that one (1) share of stock in this corporation shall be issued to each of the following named persons.

230 L. C. Perryman, Tulsa, Ind. Territory.
George B. Perryman, Tulsa, Ind. Territory.
Samuel C. Davis, Tulsa, Ind. Territory.

And that we share and share alike in the sale of said stock.

All the stock being duly subscribed for in the Tulsa Coal and Mining Company, it is hereby agreed to hold a stockholders' meeting.

Stockholders' Meeting of the Tulsa Coal and Mining Company.

The stockholders being present as follows: J. A. Bolen, E. K. Criley, Bennett Brown and J. T. Nelson. By unanimous vote E. K. Criley was elected chairman, and J. T. Nelson, secretary of the meeting.

By motion of J. A. Bolen, and seconded by Bennett Brown, the following board of directors were voted upon and duly elected for the ensuing year, or until their successors shall be elected and qualified.

J. A. Bolen E. K. Criley
Bennett Brown J. T. Nelson
L. C. Perryman.

On motion of Bennett Brown, by unanimous vote, the stockholders adopted the following by-laws:

By-laws of the Tulsa Coal and Mining Company.

Article # 1. The annual meeting of the stockholders shall be held on the second Monday in January. The regular meeting of the directors shall be held immediately after the stockholders' meeting of each year, at the office of the corporation, in the city of Kansas City, county of Jackson, State of Missouri. Notice of the time and place of such stockholders' meeting, signed by the president or secretary, shall be published in some daily newspaper of said city of

231 Kansas City, for at least two weeks previous to such meeting, or by a written notice mailed to the last known address of each stockholder, two weeks previous to said meeting. At such meeting each stockholder shall be entitled to cast one vote in person, or by duly authorized proxy upon each share of stock held by him for thirty days prior to any such meeting.

Article # 2. At their annual meeting, the stockholders shall elect a board of five directors to hold office until the next annual election, or until their successors are duly elected and qualified. The directors shall have power to fill vacancies in their number occasioned by resignation or otherwise.

Article # 3. Regular meetings of the board of directors shall be held immediately after the adjournment of each meeting of the stockholders.

Article # 4. The officers of the corporation shall consist of president, vice president, secretary and treasurer. Any two of such offices may be held by the same person, who must be a stockholder.

Article # 5. It shall be the duty of the president to preside at all meetings of the board of directors, to have the general supervision of the business of the corporation and appoint a general manager, subject to the approval of the directors, and perform such other duties as are usually performed by such officers.

Article # 6. It shall be the duty of the vice-president to discharge all the duties of the president during his absence, or when he cannot act.

Article # 7. It shall be the duty of the secretary to keep a faithful record of the proceedings of the stockholders and board of
232 directors' meeting, and shall take care of and preserve the records and stock-books of the corporation, and be the custodian of its corporate seal.

Article # 8. It shall be the duty of the treasurer to keep and faithfully account for all money of the corporation, which may come into his possession or under his control.

Article # 9. Meetings of the board of directors may be called at any time by the president or secretary. Any four directors shall constitute a quorum for the transaction of business.

Article # 10. The stock of this company shall be transferable only on the books of the company and certificates of stock issued, shall be signed by the president and counter-signed by the secretary, and the seal of the company affixed thereto.

On motion of Bennett Brown, the meeting is adjourned.

JAS. A. BOLEN.
E. K. CRILEY.
BENNETT BROWN.
J. T. NELSON.

Board of Directors' Meeting.

At a regular meeting of the board of directors of the Tulsa Coal and Mining Company, held at Kansas City, Mo., May 19th, 1896, immediately after the adjournment of the stockholders' meeting there were present, J. A. Bolen, E. K. Criley, Bennett Brown and J. T. Nelson, they constituting a quorum. The board proceeded to the election of officers, which resulted in the unanimous election of

J. A. Bolen, president,
E. K. Criley, vice-president,
233 J. T. Nelson, secretary.
E. K. Criley, treasurer.

Bennett Brown was appointed general manager of the company by J. A. Bolen, and said appointment approved by the board.

There being no further business, the meeting adjourned subject to the call of the president or secretary.

JAS. A. BOLEN.
E. K. CRILEY.
BENNETT BROWN.
J. T. NELSON.

KANSAS CITY, Mo., June 1st, 1896.

At a special meeting called by the president, of the board of directors of the Tulsa Coal and Mining Company, held in Kansas City, Mo. June 1st, 1896. There were present Jas. A. Bolen E. K. Criley, Bennett Brown and J. T. Nelson. The president presided. A motion was made by E. K. Criley that J. T. Nelson, the secretary of this company, should do anything necessary for the developing and looking after the interest of the company and should especially use his time in prospecting for coal on the lease of this company in the Creek Nation and generally devote his time to the interest of the company and that he should be paid all expenses incurred and that he should have a reasonable salary for the time so employed.

Motion seconded and carried. After discussing in a general way the interest of the company and of the duties imposed on said J. T. Nelson, for the company, on motion the meeting adjourned.

J. T. NELSON, Sec.

234

KANSAS CITY, Mo., June 5th, 1897.

Meeting of the board of directors of the Tulsa Coal and Mining Company.

Meeting called to order by Jas. A. Bolen. There *was* present Jas. A. Bolen, E. K. Criley, Bennett Brown and J. T. Nelson.

The resignation of Bennett Brown as a director of this company was accepted and E. H. Brown was duly elected to fill this office.

E. H. Brown being present, the resignation of E. K. Criley as vice-president was accepted and E. H. Brown elected vice-president.

E. K. Criley's resignation as a director and treasurer of this company was accepted and C. C. Nelson was elected treasurer and a director. The order of appointment of Bennett Brown as general manager of this company was revoked by the president.

Meeting adjourned.

J. T. NELSON, Sec.

FORT SCOTT, KANSAS, April 4th, 1898.

At a called meeting for this day of the board of directors of the Tulsa Coal and Mining Company, there *was* present E. H. Brown, J. T. Nelson, C. C. Nelson; representing a majority. Meeting was called to order by E. H. Brown. The resignation of James A. Bolen as president and a director of this company was accepted and E. H.

just prior to the 4th of March they had a meeting, in Mr. Guss's room or at the Guthrie bank, one, and determined that they would exercise their option of returning the property, and Mr. De Bois was instructed to inform Mr. Nelson of that fact. Mr. De Bois said that he has a very strong recollection, or is very strong of the impression that he wrote a letter to that effect, and he is also very positive that he sent a telegram to the same effect, notifying Mr. Nelson. If he sent the letter, he kept no copy of it, or made no press copy or otherwise of it, and if he sent the telegram there has been no evidence produced other than the oral testimony of Mr. De Bois. Mr. De Bois evidently is of the opinion that he sent such a letter and such a telegram, but the evidence is just as positive on the other side by Mr. Nelson that he never received either such telegram or such a letter. He did write to Mr. McNeal on the 25th day of February, informing Mr. McNeal that he would hold them to the letter of the contract either to pay that money before or by the 4th of March or to return the stock, together with the other property.

Mr. McNeal wrote him on the 27th, only a week before the option would expire, and said he was going to Washington and wouldn't probably be here on the 4th to return the stock to him, and and letter doesn't in anyway state that they don't intend to pay for the stock or that they intend to return it. It is uncertain in its terms, it doesn't furnish any information to Nelson as to what Mr. McNeal intends to do. Mr. De Bois also wrote a letter on the 27th and the evidence is that Mr. De Bois was a stockholder in the com-
255 pany himself at that time, and was interested in this company, and he in his letter does not indicate to Mr. Nelson which they are going to do; it does not say that they will exercise the option or that they will pay the money, so that there is nothing in the evidence here that shows that they transmitted to Nelson any communications which he received to the effect that they declined to pay the money and intended to return the stock. The contention is made that it was only necessary that they be ready and able and willing to turn the stock over here at the Guthrie national bank. As a matter of law, that is probably correct, and if they had been in a position to have tendered the stock, and had tendered the stock, and hadn't appropriated the dividends on it, I am inclined to think that that would be sufficient, but the appropriation of the earnings of that stock during that time, without any effort to surrender or return it, I think bound them until such time as they gave it up.

Now, the other defense is that the plaintiff, Nelson, made false and fraudulent representations to the parties by which they were induced to enter into this contract. It will be remembered that this is a contract entered into in May, not to be performed until the following March; that the $500 was paid as an option; during that period from May until March, these parties together with their associates, had absolute control of the corporation; had the control of Nelson's stock; they had the control of three-fourths of the entire

stock of the corporation, with the opportunities fully to investigate every property it had, and to ascertain all about it before the time expired and could have ascertained and possibly did, just what the conditions were; I say I assume they did from the fact that it is in evidence that they did decide in their own minds that they would not take the property, that they would exercise their option
256 and return it. Now, unless they were misled to their damage by representations made by Nelson, it would be immaterial how many false representations or false statements he made, because false representations or false statements made to induce a party to enter into a contract, will not relieve him of the contract, unless he has been misled to his detriment or damage. A party may lie to me about everything that enters into a contract, and if I don't rely on it, and believe it to be true, and it results in a damage to me, I can't avoid my contract on account of it. Now, if Nelson did make false statements to them about the capacity of this mine, if he made false statements to them about the value of these leases, if he made false statements to them about the validity of the leases, and they took an option on it to the 4th of March, and during that time they had control of the entire matter themselves and had it on their own hands with opportunities to investigate it, the $500 is the only thing he beat them out of, it wasn't this $4500, because by exercising their option to return it, and did it, they would have been relieved of the contract, and so if they have been damaged by this, the damage has resulted from their own failure to exercise the option within time and in such manner as can avoid the contract. There is quite a dispute in the evidence as to the representations he did make. I am inclined to the opinion that the representations he made as to the validity of these leases, is nothing more than a matter of opinion. Lawyers have given opinions about it, and courts might express opinions about it, and individuals may have an opinion about it, and one is about as good as another, as far as I know about the Creek laws and the constructions put on them by the departments down there, and the constructions put on the laws of
257 Congress by the department; I don't know but what one man's opinion is about as good as a good lawyer's opinion, as to what the result would be, but it could be nothing more than an expression of opinion and a man is never held responsible for the expression of an opinion in a trade, it must be a representation of an existing fact, and not the expression of an opinion on a fact simply.

They claim he made false representations as to the quantity of coal that these mines, or the Tulsa mine, was handling. Now, there is a discrepancy between the evidence of the several defendants on that proposition. Mr. Greer, as I remember it, was very positive he stated the output was 20 carloads a day; some witness I believe that was Mr. De Bois, said it was somewhere between 15 and 25, but he wasn't certain as to the number that he stated; Mr. McNeal said his recollection was that he stated that they were shipping twenty car-

loads of coal a day. Mr. Gray said that he said that either they were shipping or that they could ship twenty carloads or that they could take out twenty a day. Now, Mr. Nelson says what he stated was he hadn't been over there since January, the time he made this deal, and that he did represent to them that Brown wasn't properly reporting matters, that he didn't know what Brown was getting out, and that Brown wasn't paying them anything. Now, Mr. McNeal and Mr. Greer corroborate that statement that he did tell them that Brown was doing them up, and there was no report coming in, and that they thought he was getting a good deal more probably than the showing made, but he didn't know how much he was getting, and if they could get control of the stock, in the hands of some one party or more that were friendly to each other, they could compel Brown to disgorge and make a showing as to what he was getting out of the mine, so that there is quite a discrepancy in the testimony there as to just what he did say.

258 Nelson says he told them that he hadn't been there, that Brown wasn't reporting to him; that Brown was unfriendly to him; that he got the information from Mr. Hobart, at St. Louis, the president of the Texas & Kansas Company, which company was operating the lease, that they had bought a steam shovel and was going to put that in operation, and as quick as they could get that in operation they could take out 20 carloads a day or over, and if I remember right, Mr. Greer spoke also of the fact that they mentioned to him the getting of this steam shovel or some machinery by which to operate the mine more extensively.

But then, they were there, if he had made that representation, it would be a representation as to a fact that that mine was producing that much, and if the mine was capable of producing it, and it could be produced, it would not be a representation of fact which would injure or damage the defendants, and I think from the evidence in this case that it fairly shows, both from the evidence of Mr. McNeal and the evidence of Mr. De Bois and the evidence of Mr. Nelson, that if the mine was worked, 20 cars a day would be a very fair output for it, and would not be a large output for it, that that is its reasonable capacity, and the reason it is not, is simply because it wasn't worked to the extent to take it out, so that the representation of a fact that it was being taken out by working it, because this company had subleased to the other company, I don't know what their contract was with them, it is in evidence here but I haven't read it, but they certainly can control their own property, and have had them to work it more extensively probably than they did.

Now, as to the failure of consideration, I am inclined to think—I don't know what the laws of the Choctaw nation are, but

259 if Congress has not got control of the Indian nations and their lands,—these leases would be evidence to my mind that it ought to have, that two or three parties could organize, and two or three Creek Indians and secure what they term leases of the entire Creek country for coal and mineral purposes by expending a

few hundred dollars on each hundred thousand acres,—would be evidence that if Congress didn't control it, it ought to do it, and I don't know what the law is on that subject. It is a very hard question. I was for a long time of the opinion that this Curtis act was unconstitutional in so far as it attempted to deal with the title of the Indians, or the right to deal with their lands as they saw fit, and that would be my own individual opinion yet, but from the most of the higher courts and the way the Supreme Court of the United States has been going over this question, I am very strongly inclined to the opinion that when it comes up to them, it will hold that Congress has power to deal with the lands of an Indian nation, so long as they hold them in a tribal capacity, although they hold them in fee simple. I think they have indicated that in some opinion in relation to other lands somewhat similarly situated, that they are wards of the Government, and the Government has the right through the Congress of the United States, to control their property and property rights so long as they hold them in their tribal capacity.

These leases, whatever they were, were before the parties when they dealt; they were in the possession of Nelson and were delivered to the parties at the time they made this optional contract. It is contended by Mr. DeBois that they show on their face that they hadn't been extended up to the time that this optional contract was entered into. If that was the case, it was just as open to de-
260 fendants as it is now. As I suggested in answer to his argument, a man can't shut his eyes to a thing that is apparent and say he didn't know it, the law don't permit him to do that, he has got to exercise his senses; he has got to use his eyesight and his hearing, and his common knowledge when the matter is presented to him. Whatever that imparts to him, or what import to him is exercised, he is bound to know, although he may not know it as a matter of fact. Now, whatever was endorsed on there, whatever is writing there,—it is not shown that any of these parties couldn't read writing, they were bound to know, they were bound to take notice of it, and it imparted just as much information to them then as it does now.

It is not shown that any of these parties connected with this corporation or any one of the ten corporations had taken any acts or complied with the provisions of the Curtis law, but on the contrary were assuming to hold in opposition to that law, and held as owners or claimants of vested rights under the right acquired from the Choctow nation under its lease. Notwithstanding that fact, the evidence shows that the Secretary of the Interior has permitted this company to go on and operate one of the mines, the Tulsa mine, has accepted the royalties from it, and they have been operating it on up until recently, probably now, I don't know, up until within the last two or three months. It has been operated right along and must have been operated under the provisions of the Curtis law or under the authority conferred by the Secretary of the Interior, and Mr. McNeal testified that the two cent royalty had been paid up until I

think he said December, to him as treasurer of this company, and while there might have been no affirmative action taken, the fact that they were in possession and doing a commercial business and operating this mine, has reserved much to this company, and if they haven't
261 within the time limited exercised their option, they might be able to do it, I don't know. If they have looked after their interests as they should have done, they should have had at least the 640 acres protected by this one lease, but there is no evidence here as to the value of it except in a general way, and the court is unable to say as a matter of fact under this evidence that even if only the one lease is being operated, that it would not be worth the amount of this consideration. Failure of consideration is a matter of proof. It is true these parties are not getting all that it would indicate from the evidence, that they contemplated in the purchase of this stock, that is, with these ten companies, there is probably nine of them here that *is* no good, of no value, unless, as I say the court should hold the Curtis act unconstitutional, and then if these rights had been followed up under the Creek laws, they might have valuable rights there, but assuming that this is the only right that they have, the amount that is now being paid royalty, there is no evidence that it is worth less than the sum paid for this stock, or what this one corporation might own.

I don't think, as I say, there *is* any difficult questions of law in the case, there *is* not, to my mind; it is always an unpleasant task to deal with facts where they are controverted and a person has to reconcile them with the conditions as they exist, but taking the case as a whole, the burden being on the *plaintiff* to show by a preponderance of evidence such facts as would entitle them to be relieved of this written contract, the court is of the opinion that they have failed to do it. Finding and judgment will be for the plaintiff for the sum mentioned in the contract, at the legal rate of interest.

By Mr. HORNOR: We will except to the judgment of the court.

262 Thereafter and on the 20th day of February, 1903, the court after hearing the evidence and the argument of counsel, and being duly advised in the premises, enters the following order and judgment, to wit:

In the District Court of Logan County, Oklahoma Territory.

J. T. NELSON, Plaintiff,
vs.
U. C. GUSS, J. W. MCNEAL, W. H. GRAY, and Frank H. Greer, Defendants. } #3236. Journal Entry.

And now to wit: on this 19th day of February A. D. 1903, being one of the regular judicial days of the regular February term, A. D.,

1903, of the district court of said county this case came on for trial upon the regular call of the docket. The plaintiff appeared in person, and by his attorneys, W. R. Biddle, Geo. S. Green and Selwyn Douglas; and the defendants and each of them appeared in person and by their attorneys John D. De Bois and C. G. Hornor, their attorneys, and both parties announced themselves ready for trial. Thereupon in open court parties hereto by their counsel waived the intervention of a jury and consented to the trial of this action by the court, and with the consent of the court the issues herein made by the petition, the amended answer and the reply were submitted to the court without the intervention of a jury for trial.

The trial thereupon proceeded, and after consideration, with the consent of the parties it was conceded that the burden of the issues were upon the defendants in this action.

Thereupon the defendants introduced and had sworn and examined a number of witnesses to support the issues upon the
263 part of the defendants and each of them. There not being time to complete the trial on this date, a further hearing thereof was continued until 9 o'clock a. m. on February 20th, A. D. 1903.

On February 20th, A. D. 1903, at 9 o'clock in the forenoon, the trial proceeded with the same counsel and parties present as yesterday. The defendants produced additional evidence and rested their case. Thereupon the plaintiff introduced his witnesses who were sworn and examined in his behalf, evidence was thereupon introduced in rebuttal; after which counsel on both sides argued the case to the court, and the court after hearing all of the evidence and argument of counsel and being fully advised in the premises, finds for the plaintiff on all of the issues in this action; and finds that said defendants and each of them are indebted to said plaintiff upon the contract sued upon and set out in his petition in the sum of four thousand and five hundred dollars ($4500) with interest thereon at the rate of seven per cent. per annum from the 4th day of March A. D. 1901, and that the plaintiff is entitled to judgment against the said defendants therefor.

It is thereupon considered, ordered and adjudged by the court that the said plaintiff, J. T. Nelson, have and recover of and from the said defendants, U. C. Guss, J. W. McNeal, W. H. Gray and Frank H. Greer, and each of them the sum of four thousand and five hundred dollars ($4500), being the principal sum named in said contract sued upon herein, and the further sum of six hundred sixteen and 87 / 100 dollars (616.87) being the interest accrued thereon from the 4th day of March, 1901, and amounting in the aggregate, both principal and interest to the sum of five thousand one hundred sixteen and 87 / 100 dollars ($5116.87).

It is further adjudged and decreed that the said plaintiff
264 also have judgment against the said defendants and each of them for the costs of this action, taxed at — dollars. For all

of this judgment including principal, interest and costs let execution issue.

JNO. H. BURFORD,
Judge of the District Court of Logan County,
Oklahoma Territory.

O. K.
GEO. S. GREEN,
Attorneys for Plaintiff.

O. K.
COTTERAL & HORNOR,
Attorneys for Defendants.

Endorsed: # 3236. In the district court of Logan county, Oklahoma Territory. J. T. Nelson, plaintiff, *vs.* U. C. Guss, J. W. McNeal, W. H. Gray and Frank H. Greer, defendants. Journal entry. Filed Feb. 26, 1903. Thos. A. Neal, clerk district court.

Thereafter and on the 21st day of February, 1903, the defendants herein filed their motion for new trial, which said motion, with the endorsements thereon, is in words and figures following, to wit:

265 In the District Court of Logan County, Oklahoma Territory.

T. J. NELSON, Plaintiff,
vs.
U. C. GUSS, W. H. GRAY, J. W. MCNEAL, and Frank H. Greer, Defendants. } Motion for New Trial.

Come now the said defendants and move the court to vacate and set aside the judgment rendered herein on February 20th, 1903, and grant defendants a new trial thereof upon the following grounds:

1. Irregularity in the proceedings of the court and of the plaintiff and abuse of discretion by which defendants were prevented from having a fair trial.
2. Misconduct of the plaintiff.
3. Accident and surprise which ordinary prudence could not have guarded against.
4. Error in the assessment of the amount of recovery.
5. That the decision of the court is not sustained by sufficient evidence.
6. That the decision of the court is contrary to law.
7. Error of law occurring at the trial and excepted to by the defendants.

JNO. D. DE BOIS &
COTTERAL & HORNOR,
Attorneys for Defendants.

Endorsed: In the district court of Logan county, Oklahoma Territory. T. J. Nelson, plaintiff, *vs.* U. C. Guss, W. H. Gray, J. W. McNeal, and Frank H. Greer, defendants. Motion for new trial. Filed Feb. 21, 1903, Thos. A. Neal, clerk district court. Jno. D. De Bois and Cotteral & Hornor, attorneys for defendants. 3236.

266 Thereafter and on the 4th day of April, 1903, said cause came on to be heard upon the defendants' motion for new trial herein, and the court, after hearing the arguments, makes the following order, to wit:

In the District Court of Logan County, Oklahoma Territory.

J. T. NELSON, Plaintiff,
vs.
U. C. GUSS, W. H. GRAY, J. W. MCNEAL, and F. H. Greer, Defendants.

3236. Journal Entry Overruling Motion for New Trial.

And now, to wit: on this 4th day of April A. D. 1903, the motion of the defendants and each of them for new trial in this action came on to be heard by the court. The plaintiff, J. T. Nelson appeared by Geo. S. Green, his attorney, and the defendants and each of them appeared by John De Bois and C. G. Hornor, their attorneys. Thereupon said motion for a new trial was argued by counsel and considered by the court, and was by the court overruled, to which ruling of the court the defendants and each of them excepted.

For cause shown the defendants were given sixty days in which to make and serve a case for the supreme court upon the plaintiff. Said plaintiff to have ten days in which to suggest amendments thereto. Said case-made to be settled upon five days' notice by either party.

The court further ordered that execution be stayed upon this judgment for the period of sixty days from this date.

JNO. H. BURFORD,
Judge of the District Court.

O. K.
GEO. S. GREEN,
Attorneys for Plaintiff.

O. K.
JNO. D. DE BOIS,
Attorneys for Defendants.

267 Endorsed: # 3236. In the district court of Logan county, Oklahoma Territory. J. T. Nelson, plaintiff, *vs.* U. C. Guss, W. H. Gray *et al.*, defendants. Journal entry overruling motion for a new trial. Filed Apr. 17, 1903, Thos. A. Neal, clerk district court.

Thereafter and on the 4th day of May, 1903, upon the request and with the consent of the plaintiff, of defendants, said defendants were granted an extension of time in which to make and serve said case-made, and the court granted a further stay of execution on said judgment, until July 1, 1903. The defendants were given sixty days' additional time within which to make and serve said case, with ten days to the plaintiff to suggest amendments, to be settled on five days' notice.

268 TERRITORY OF OKLAHOMA, } ss:
Logan County, }

We, the undersigned, attorneys for the defendants, do hereby certify that the above and foregoing is a true, full and complete record of all the pleadings, orders, evidence, judgments and all proceedings had and done in said cause.

JOHN D. DE BOIS AND
COTTERAL & HORNER,
Attorneys for Defendants.

Filed Sep. 21, 1903.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, Deputy.

TERRITORY OF OKLAHOMA, } ss:
Logan County, }

We, the undersigned, attorneys for the plaintiff, do hereby accept service of the above and foregoing case-made, this 26th day of June, 1903.

GEO. S. GREEN,
Att'y for Plaintiff.

We also waive the suggestion of amendments thereto, and consent that the same may be settled and signed by the judge of the district court of Logan county who tried said cause, at any time, without further notice to us of said settlement and signing.

____ ____,
____ ____,
Attorneys for Plaintiff.

269 TERRITORY OF OKLAHOMA, } ss:
County of Logan, }

I, John H. Burford, judge of the district court of Logan county, Oklahoma Territory, do hereby certify that the within and foregoing case-made has been duly presented to me by the parties thereto, as required by law, in due time; that the suggestion of any amendments thereto has been duly waived, and that the same as presented to, and corrected by me, contains a full, true and complete transcript

of all the pleadings, motions, orders, evidence rulings and judgments and proceedings filed, had and entered therein; and I hereby allow, settle, certify and sign the same as true and correct, and order that the clerk of the district court of Logan county attest the same with the name and seal of said court, and file the same of record, as required by law.

Witness my hand at Guthrie, this 29 day of July, 1903.

JNO. H. BURFORD,
Judge of the District Court of Logan County, Oklahoma.

Attest: T. A. NEAL,
[SEAL.] Clerk District Court.

Filed Sep. 21, 1903,

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, Deputy.

270 Said case-made is endorsed as follows: No. 1394—U. C. Guss, J. W. McNeal, W. H. Gray, and Frank H. Greer, plaintiffs in error, *vs.* J. T. Nelson, defendant in error—Petition in error and case-made—Filed Sep. 21–1903—Benj. F. Hegler, clerk supreme court, by Jessie Pardoe, deputy.

271 And thereafter, at the January, 1904, term of said supreme court, on the twelfth day of January, 1904, the following proceeding was had in said cause, to wit:

U. C. GUSS, J. W. MCNEAL, W. H. GRAY, and FRANK H. GREER, Plaintiffs in Error,
vs.
J. T. NELSON, Defendant in Error. } #1394.

Come now J. D. De Bois and Cotteral & Hornor, for plaintiffs in error, and George S. Green, for defendant in error, and oral argument is made herein, and cause is now taken on oral argument and briefs.

272 Afterward, to wit, at the June, 1904, term of said supreme court, on the second day of September, 1904, the following further proceeding was had in said cause, to wit:

U. C. GUSS, J. W. MCNEAL, W. H. GRAY, and FRANK H. GREER, Plaintiffs in Error,
vs.
J. T. NELSON, Defendant in Error. } #1394.

And now this cause comes on for final hearing and determination by the court upon the record, briefs and oral argument herein. And the court having duly considered the same, and being fully

A. I had reference to the foreclosure of the roadbed.

Q. I am speaking of the railroad stock, that is when you owned the railroad stock?

A. Yes sir.

Q. When you owned the $250,000 of the railroad stock or the coal stock?

A. Yes sir.

Q. That is the stock of these companies?

A. Yes sir.

Q. And it was while you owned that?

A. Yes sir.

Q. And you remember that while you were there you ascertained that from the president of the company, or did you?

A. I think we did.

Q. That was the only reason why I came over, wasn't it?

A. Yes sir, after we went to Mr. Nelson's office, then of course the question naturally came up about the condition of this stock
248 there, and I think we went to your office, wasn't it?

Q. I think we were both places.

A. I think we were both places, yes sir, and that we talked over the legality of the holding of these leases under that Curtis act, what effect the Curtis act had on them. That was the principal topic of discussion at that time, the effect of the Curtis act on the leases.

Q. Well, you remember that when you were in Mr. Nelson's office, just across the street from my office,—my office is upstairs and this office is on the first floor?

A. I don't know that I can locate in my mind just the relative positions of your offices, but we were both places.

Q. Do you remember we were in the back room, and that all these books and papers were on the table?

A. Yes, that is true, they were all there, that is, Mr. Nelson said they were all there, and we looked at some of them, and I took it for granted they were all there.

Q. You and Mr. Greer were there?

A. Yes sir.

Q. Do you remember what time you got to Ft. Scott—do you remember that you stayed all night?

A. Yes sir, we stayed all night at the hotel,—I believe that we got there on Sunday night, if I recollect it correctly, and we were there on the next day until we got a train over I think to Nevada, Missouri, wasn't it, and went over there in the afternoon or near noon.

Q. About two o'clock in the afternoon?

A. Some time in the afternoon.

The defendants here rest.

The plaintiff here rests.

Evidence closed.

249 TERRITORY OF OKLAHOMA, } ss:
Logan County, }

I, Thomas A. Higgins, do hereby certify that I am the official court reporter of the district court of Logan county, Oklahoma; that as such I took the evidence in the above cause, and that the above and foregoing transcript contains a full, true and complete record of all the oral evidence introduced on the trial of said cause.

Dated this 20th day of June, 1903.

THOMAS A. HIGGINS,
Court Reporter.

Thereupon the court rendered the following opinion which was taken down by the court reporter and extended and made a part of the case-made as follows:

By the COURT: It will be observed that this contract does not say a sale; he agreed to turn over 25% of the capital stock of ten coal companies which were organized in the Indian Territory in the Creek Nation,—turn over to U. C. Guss, F. H. Greer, J. W. McNeal and W. H. Gray, the consideration of the delivery upon which the stock was to be turned over also included the delivery of the records belonging to each of the ten companies, with seals and all the other records in any way connected with or belonging to each company. Then the contract proceeds: A payment of $500 is to be made in cash on the delivery of the above named property and additional property in the way of stock hereinafter listed. The $500 is to be considered an option on all said property until the 4th day of March, 1901; at that date the above named parties are to pay to Nel-
250 son the additional sum of $4500.00 or in lieu thereof turn back to said Nelson all the property delivered by him." Then follows the number of shares of stock in each company that he agrees to turn over, after which is the following provision: The $500 above mentioned is to be earnest money to be forfeited in case the balance of payment is not made. Nelson also agrees to give U. C. Guss his proxy as director in each of the above named companies until such time as it may be convenient for him to resign and Guss or someone else to be elected to fill the vacancy."

There has been a good deal of testimony on this contract; testimony indicating that this was a purchase of property by these parties, or a purchase of mining leases of coal lands in the Indian Territory. While it is true the consideration collaterally involved coal leases in the Indian Territory, this was a purchase of stock in an incorporated company, purely and nothing more. It involved whatever the corporation owned to the extent of the shares held by these parties and no more. It is a written contract entered into by parties competent to contract, able to contract, and as appears from the evidence, intelligent and practical business men. I think it can be

considered as nothing more than an option by which Nelson agreed to transfer to these people certain shares of stock to be held by them until the 4th of March, following, at which time they would pay him $4500 in cash. That is the contract. In the event they failed to pay him that, they would return the stock and property which he had agreed to deliver to them. He has brought an action upon the written contract, alleging that they failed to turn over to him the property, and failed to exercise their option, and he therefore sues for the $4500 under the contract. If they failed to exercise the option, then they are liable to him for the $4500
251 or the return of the stock, at his option. They are given an option in the written contract; they are required to exercise that option by a certain time; on failure to exercise the option, then he may elect whether or not he will sue to recover the stock or the price agreed to be paid in the written contract. He has elected to sue for the money and the parties are bound for it under the terms of the written contract, unless they show some one of the things which they have alleged as defense. They have set up three defenses to the causes of action. They allege first that they exercised their option within the time and tendered back the stock; they allege secondly, that they were induced to enter into this contract on the fraudulent and false representations of the plaintiff, Nelson. They allege, third, that there were representations made as to the value of this property, this stock that they were purchasing, and that the consideration has failed in whole or in part. Now, each of these defenses are affirmative defenses. The written contract stands and protects the plaintiff, unless the defendants have by a preponderance of the evidence established some one of these defenses by which they are entitled to avoid the operations of the writings to which they have subscribed their names. Written contracts the courts regard as the highest evidence of the way in which parties may transact their business, and when one is executed and delivered, the parties are bound by it absolutely, unless they can defeat it by showing that they have complied with it, or that they have been induced to enter into it through the fraud of the party who seeks to obtain the benefit of it, or that the consideration for which it was given, has failed.

252 The burden being on the defendants to establish some one of these defenses, if they have failed to establish them or some one of them by a preponderance of the evidence, then they must fail and the court is bound to give judgment for the plaintiff on the written contract.

It is always a difficult task to avoid a written contract. We sometimes have things arising in court where some old, decrepit person has been misled by some shrewd business man, lightening rod agent or something, inveigled into signing his name to something he couldn't read, and didn't know what the contents of it was, and they told him there was something in it that wasn't in it, and courts often set aside these contracts. It is seldom we have these

kind of complications arising among intelligent business men that are usually competent to look after their own affairs and observing matters; they enter into contracts and act upon their own judgment usually rather than what is represented to them by others, yet if false representations are made, with the intent to deceive, and they do mislead and deceive, and persons are damaged by the misleading and false representations, then it relieves anyone from such a contract. Now, what are the facts? The first facts that developes under this contract was that Nelson, in compliance with this contract, delivered to McNeal for these defendants, the stock which he had agreed to deliver, and that he received $500 cash. There was one of the mines being operated by the company through a sublease; during the period this company run, that company was paying a royalty of two cents per ton for each ton of coal they had reported was being taken out, to the treasurer, by one of the companies in which these parties took stock. That, according to the testimony of Mr. McNeal, up to the 4th day of March, amounted to about $500.00.
253 That money was distributed, two-thirds of that was earned by this stock that was covered by this option. This was distributed amongst these four stockholders, Greer, McNeal, Guss and Gray. That earning belongs to this stock in controversy. The owner of that earning was whoever was the owner of that stock. The stock earned it and it belonged to it. Now while they were the holders of this stock during that period for all the purposes of holding, for the purpose of controlling the affairs of the corporation, and electing officers, they were not the owners of it in fee, they were holding it in trust until the title of it should pass, when they should finally exercise this option. At the end of the period, the evidence is not very clear as to what they did do, but it is clear upon this proposition, that they never did tender back or offer to Mr. Nelson the earnings of that stock; they haven't offered it to this day, they didn't offer it in the pleadings, and didn't offer it on the trial, and my judgment is that they could not be heard to say that they had exercised the option not to take the stock, unless they were in a position to surrender to him not only the stock, but the earnings of the stock during that time, and have tendered him these earnings.

Now, as to the question as to whether the stock was ever offered back, I am very clear in my conviction that there was an affirmative obligation resting upon these parties; there was no affirmative obligation resting upon Mr. Nelson. All he had to do was to wait until the 4th day of March; he didn't have to give notices, and didn't have to request the delivery, and didn't have to request payment; in fact, he had to take no steps or no action whatever. On the other hand, there was an affirmative obligation resting upon the defendants by which they were required to do one of two things:
254 they must either on or before the 4th of March, offer him back his stock with the earnings that they had received on that, or they must pay him the $4500. Now, as a matter of fact they haven't done either. There is evidence here to the effect that

It is contended that inasmuch as the defendant in error, Nelson, did not reside or have a place of business in Oklahoma, but did reside beyond the limits of the Territory, that all they had to do in order to fulfill the requirements of the law under the contract which designated that they should return the property to Nelson, was that they should simply elect to rescind, and that they were under
277 no obligations either to return the property, or even to notify Nelson of the fact of their election; but if they are mistaken in that position, that they did in fact notify Nelson of their election, and that the property was at the bank in Guthrie, and that if they were required to do anything, that this was a sufficient compliance with that provision of the contract which required them to return the property.

As stated before, the court found against the plaintiffs in error upon the questions of fact involved in this contention; that is to say, the court found as a matter of fact that *Du* Bois did not write the letter or send the telegram, and that Nelson did not receive the letter or the telegram that *Du* Bois claimed to have sent. The evidence upon this proposition being conflicting, this court will not disturb the finding.

This leaves the proposition resting upon the contention of plaintiffs in error that under the law they were not obliged to return the property or give notice of the election to rescind, and this because of the fact that the defendant in error did not reside within the Territory, and had no place of business therein. Is this contention well taken, and do the authorities cited by plaintiffs in error sustain it? We think not. Each and every authority cited by the plaintiffs in error is based upon a rule of law that has no application to this case whatever. The cases cited by counsel are these: That where A is indebted to B upon a contract for the payment of money, made at a certain designated place, and no place of payment is mentioned in the contract, that it is payable where made, and when B resides beyond the limits of the realm, or in other words, in this case, beyond the limits of the Territory, that A is not obliged to hunt B up in order to pay him, but that if he is ready, willing and able to pay at the maturity of the contract, that is sufficient.

We find no fault with the law laid down by the several courts cited by plaintiffs in error, but it is not applicable here. The propositions decided in those cases are not the propositions arising here. Those cases pertain only to questions of payment of simple contracts. They do not involve questions arising under the rights of rescission of contracts, or rights arising on optional contracts, or questions arising under the provisions of contracts to return property.

In this case, the contract was for a sale of the mining stock mentioned and described therein. The delivery of the property together with the payment of $500.00 completed the contract, and transferred the title to the plaintiffs in error, subject, however, to the right of plaintiffs in error to exercise their option either of paying the remainder of the purchase price, or of rescinding the contract and

returning the property. The right to return the property was a condition of the sale. It was a condition subsequent, the performance of which would have rescinded the obligation of plaintiffs in error to pay the purchase price. The performance of the option to return was subject alone to their election. The plaintiff below had no power whatever to prevent or effectuate it. It could only be performed by the voluntary act of the plaintiffs in error. If they failed to perform it, the conditions were discharged, and the promise to pay became absolute. Some affirmative act was necessary on their part in order to complete the rescission. That is to say, the contract required them to return the property. The word "return" is very readily understood, and the plaintiffs in error could only be relieved from the obligation to return the property either by some act of the defendant in error, or by some condition making it impossible to comply with the terms of the agreement.—Stevens *vs.* Hertzler, (Ala.), 19 So. 838.

The mere fact that the defendant in error did not reside nor have a place of business within the Territory was not in itself sufficient to relieve the plaintiffs in error from the obligation to return. The rule of law governing and defining the duties of a party in returning property under an express provision in a contract to return, in optional contracts of this character, is much the same as in cases of rescission of contracts where there is a breach of warranty.

278 In the contract in this case, there is an express provision giving the plaintiffs in error the right to rescind, and that right is at the mere option of the parties. In case of a breach of warranty there is an implied right to rescind which is not optional with the parties, but is conditioned upon the breach of the warranty. The duty of a party to give notice of disaffirmance of a contract, and to return or offer to return the property, is the same in both instances, except that in cases arising under an implied right to rescind, the notice and offer to return must be within a reasonable time, while in this case, the time limiting the right to disaffirm, and within which the property was to be returned, is fixed by the contract itself.—A. & E. Enc. of Law, vol. 24, p. 645, and cases there cited; Carney *vs.* Newberry, 24 Ill. 203; Neal *vs.* Reynolds, 38 Kans., 785; Jeffers *vs.* Forbes, 28 Kans., 174.

The duty to return or offer to return the property, and the duty to give notice of the disaffirmance of the contract, is not controlled or obviated by reason of the party to whom the notice is due not residing within the limits of the State or Territory. Where there is no express provision in the contract providing otherwise, the general rule is that the property shall be returned to the place where it was received when delivered under the contract. There may be some exceptions to this rule, but this case does not fall within the exception. The notice of disaffirmance must be given in both instances, and as the parties were in communication with each other, and the plaintiffs in error had knowledge of the address of the defendant in error, of course the notice should have been addressed to

such place, and the defendant in error having notified the plaintiffs in error of the point to which he desired them to return the property, a return to such place on or before March 4, 1901, would have been a sufficient compliance with the contract.

It is not necessary to determine, and we do not determine as to whether or not it was the duty of the plaintiffs in error to return the income from the royalties, under the provisions of the option; but it was their duty in case they elected to rescind, to notify the defendant of such election, and to return or offer to return to the place from which they received it, all of the certificates of stock, books, contracts, seals and other par-phernalia pertaining to the property and the business. This they failed to do, and failing in that regard, they became liable for the remainder of the purchase price.

Having carefully examined the entire record in this case, discovering no error therein, and believing that the correct judgment was entered, the judgment of the court below is affirmed.

All the justices concurring, except Burford, C. J., who tried the case below, not sitting.

279 UNITED STATES OF AMERICA, }
Territory of Oklahoma, } ss:

In the Supreme Court.

I, Benj. F. Hegler, clerk of the supreme court of the Territory of Oklahoma, do hereby certify that the foregoing 278 pages, numbered from 1 to 278, inclusive, are a full, true and complete transcript of the record and all proceedings in said supreme court in the case of U. C. Guss, J. W. McNeal, W. H. Gray and Frank H. Greer, appellants, *vs.* J. T. Nelson, appellee, as the same remain upon the files and records of said supreme court.

In testimony whereof I hereunto subscribe my name and affix the seal of said supreme court, at the city of Guthrie, this 14th day of November, 1904.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma.

Endorsed on cover: File No. 19,534. Oklahoma Territory supreme court. Term No. 124. U. C. Guss, J. W. McNeal, W. H. Gray, and Frank H. Greer, appellants and plaintiffs in error, *vs.* J. T. Nelson. Filed November 19, 1904. File No. 19,534.

124.

No. 484.

Office Supreme Court U.
FILED
JAN 23 1905
JAMES H. McKENNEY,
Clerk

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term 1904.

U. C. GUSS, J. W. McNEAL,
W. H. GRAY, AND FRANK H. GREER
Appellants,

vs.

J. T. NELSON,
Appellee.

No .....

Appeal from the Supreme Court of Oklahoma Territory.

Motion for Certiorari and Diminution of the Record and Order on the Supreme Court of Oklahoma to Make Statement of Facts in the Nature of a Special Verdict, and Brief in Support Thereof.

FRANK DALE,
A. G. C. BIERER,
ATTORNEYS FOR APPELANTS.

THE STATE CAPITAL CO., GUTHRIE, OKLAHOMA.

advised in the premises, finds: That the judgment of the lower court herein should be affirmed, at the cost of plaintiffs in error.

It is therefore ordered and adjudged by the court, that the decision of the lower court in this cause be and the same is hereby affirmed, at the cost of plaintiffs in error. And exception is allowed.

Opinion by Pancoast, J. All the justices concurring except Burford, C. J., who tried the cause below, not sitting.

Which opinion reads in words and figures as follows, to wit:

273 In the Supreme Court of the Territory of Oklahoma, June Term, 1904.

Filed September 2, 1904.

U. C. Guss, J. W. McNeal, W. H. Gray, and Frank H. Greer, Plaintiffs in Error,
vs.
J. T. Nelson, Defendant in Error.
} No. 1394.

Syllabus.

1. Optional contract—Rescission—Notice under—Duty to return property.—Where a contract is entered into at Guthrie, Oklahoma, for the purchase of certain shares of stock of various mining companies with offices and place of business at Fort Scott, Kansas, the contract providing that it includes the delivery of the seals and all other records belonging to each of the companies, and a payment of $500.00 is made on the purchase price, which payment is to be considered as an option on all of said property until the fourth day of March, 1901, at which date the parties are to pay the vendor an additional sum of $4500.00, or in lieu thereof, turn back to the vendor all the property delivered by him, *Held*, that in case the purchasers elect to rescind and turn back to the vendor the property purchased, under the option given them, in order to entitle them to the benefit of such option, they must notify the vendor within the time given of their election, and must return or offer to return all the property, certificates of stock and records which were received by them.
2. Return of property not sufficient, when.—Where such contract is entered into, and the purchasers, on the day prior to the expiration of their option, at a meeting held in Guthrie, decided among themselves to rescind, and although they knew the address of the vendor, because of the vendor not being a resident of the Territory of Oklahoma or having a place of business in the city of Guthrie, placed the certificates of stock in the Guthrie national bank subject to the order of the vendor, and thereafter placed to his credit in such bank all the in-

come received from the royalties of the property, *Held*, not to be a compliance with the terms of the contract of rescission and return of property, which contract provided that in case the purchasers should elect to rescind they should "turn back to the vendor all the property delivered by him."

3. Oral opinion no part of record.—Where at the conclusion of a trial had before the court without a jury, the court orally reviews the evidence and expresses its opinion upon the law and the facts involved in the case, and where there are no special findings of fact and conclusions of law asked for, and where the findings and judgment of the court are embodied in a journal entry, the oral opinion expressed by the court performs no office in a case made, and cannot be considered by this court on appeal from a judgment of the trial court.

Error from the District Court of Logan County—Jno. H. Burford, Trial Judge—Affirmed.

John D. De Bois and Cotteral & Hornor, for plaintiffs in error.
W. R. Biddle, George S. Green and Selwyn Douglas, for defendant in error.

Opinion of the court by PANCOAST, J.:

Action commenced in the district court of Logan county by the defendant in error against the plaintiffs in error to recover the sum of $4500.00 upon the following contract:

"Memorandum of agreement made and entered into this 28th day of May, 1900, to wit, as follows: J. T. Nelson agrees on his part to turn over 25 per cent. of the capital stock of the following coal companies located in the Creek Nation, to wit: Sapulpa, Choctaw Catoosa, Wewoka, Red Fork, Neyaka, Concharty, Tusa, Car Creek and Broken Arrow Mining Companies, to the following persons: U. C. Guss, W. H. Gray, F. H. Greer and J. W. McNeal.

"The consideration of the delivery under which the above listed stock and other stock as hereinafter described is as follows: This also includes the delivery of the records belonging to each of said above named companies, the seals and all other records that in any way belong to any of said companies. A payment of $500 is to be made in cash upon delivery of the above named property and additional property in the way of stock hereinafter listed. The $500 is to be considered an option on all said property until the 4th day of March, 1901. At that date the above named parties are to pay to Nelson an additional sum of $4,500.00 (four thousand five hundred dollars) or in lieu thereof to turn back to said Nelson all the
274 property delivered by him. In addition to the above mentioned 25 per cent. of capital stock aforesaid, which the said J. T. Nelson represents he owns in his own right, he agrees to turn

over and deliver enough more stock to make the aggregate sum of stock delivered under this contract as follows:

Sapulpa	1210 shares	Neyaka	368 shares
Choctaw	369 shares	Concharty	369 shares
Catoosa	369 shares	Tulsa	319 shares
Wewoka	369 shares	Car Creek	368 shares
Red Fox	369 shares	Broken Arrow	369 shares

"The $500.00 above mentioned is to be earnest money to be forfeited in case the balance of payment is not paid. Nelson also agrees to give U. C. Guss his proxy as director in each of the above named companies until such time as it may be convenient for him to resign, and Guss or some one else elected to fill the vacancy.

U. C. GUSS.
W. H. GRAY.
J. W. McNEAL.
F. H. GREER.
J. T. NELSON."

The record shows that under this contract Nelson shipped the property described in the contract by express from Fort Scott, Kansas, where the headquarters of the company were, to Guthrie, all the parties being at Guthrie at the time the contract was signed, the residence of Nelson, however, being either at Fort Smith, Arkansas, or Fort Scott, Kansas, the right of the plaintiff below to recover being based upon the theory that the defendants below had failed to turn back to Nelson the property delivered to them, and therefore, under the contract, were bound to pay the remainder of the contract price of $4500.

The defendants' answer to the petition was, first, a general denial; second, that the defendants had elected to turn the property back to the plaintiff prior to the date of the expiration of the option March 4, 1901, and had tendered the same back to the plaintiff; third, that the plaintiff had induced the defendants to enter into the contract through fraudulent misrepresentations; and fourth, that there was no consideration for the contract. The trial was to the court without a jury. The findings of fact were general, and were in favor of the plaintiff below. The findings contained in the journal entry of judgment are in the following language:

"And the court, after hearing all of the evidence and arguments of counsel and being fully advised in the premises, finds for the plaintiff on all of the issues in this action and finds that the defendants and each of them are indebted to said plaintiff upon the contract sued upon and set out in this petition in the sum of four thousand five hundred dollars, with interest thereon at the rate of seven per cent. per annum from the fourth day of March A. D. 1901, and that the plaintiff is entitled to judgment against the said defendants therefor."

Under this finding, every question of fact necessary to be found and upon which the judgment is based is in favor of the plaintiff in the action; and, following the rule so frequently laid down and universally adhered to by this court that where there is evidence upon which a finding of fact may be based, this court will not disturb the finding unless it is manifestly wrong, we might very properly affirm this case without further discussion.

However, some of the legal questions arising in the trial of the case below, and discussed in the briefs in this case are so interesting, together with the fact that a considerable amount is involved, we think it may be well to notice some of the propositions contended for more in detail.

First, we think it proper to call attention to a question of practice that seems to be growing among certain members of the profession in the Territory of inserting into a case-made matters of no importance, and which cannot be considered by this court. This practice serves only to make records more voluminous than they should be, and to add to this court's labor. The record in this case is not a large one, but it contains the oral decision of the court below
275 when rendering its decision at the trial. This court, as well as the supreme court of Kansas from which we take our civil procedure act, has repeatedly held that the oral decisions of the trial court have no office in a case-made, should not be included, and cannot be considered by the appellate court, when the finding and judgment of the court below are properly formulated into a record or written order.

In this case, the findings of fact and conclusions of law of the court below are contained in the journal entry. The oral decision of the judge at the conclusion of the trial cannot be considered by this court in any way.

Notwithstanding this, the argument of counsel for plaintiffs in error is based almost entirely upon the oral statements of the trial court and it is insisted that the court made no findings upon certain propositions, and that therefore this court is not obliged to reverse the trial court's findings in order to arrive at a conclusion as to certain of the facts contended for. These contentions of the plaintiffs in error could not possibly avail anything, because this court is bound to look to the findings of fact as contained in the journal entry. A case-made should properly contain nothing but that which is necessary to enable the appellate court to pass upon the questions involved on appeal.

Every question of fact under the general finding in this case is against the plaintiffs in error. Had they desired special findings might have been made, and in such event, the questions contended for and discussed in the briefs might have been properly presented to this court, if the special findings so warranted.

The uncontradicted evidence shows that this contract was for the purchase of certain mining stocks of coal companies operating or to be operated in the Indian Territory. At the time of the contract,

the plaintiffs in error or some of them, owned certain interests in these companies or some of them, and desired to obtain a controlling interest, and in order to do so, contracted to purchase a certain amount of the stock from the defendant in error which would give them control of the property and of the company. Included in the contract for the purchase of stock was a provision for the resignation of the defendant in error as director, the transfer of the books, papers, records and seals of the companies, and the election of new directors. Some of the plaintiffs in error at the time of the contract were holding positions as officers of the company, and were familiar with the place where the business of the company was transacted, and where the records were kept.

Now, to take up the first issue raised by the answer, "that the defendants had elected to turn said property back to the plaintiff prior to the fourth day of March, 1901, and had tendered the same back to the plaintiff," all questions of fact involved in this issue were decided by the court below in favor of the defendant in error, and there being evidence sufficient upon which to base such a finding, this court, under the rule hereinbefore mentioned, will not disturb the same. We will, however, again refer to this issue later on.

The second issue raised by the answer, that plaintiff had induced the defendants to enter into said contract by fraudulent representations, and the third, that there was no consideration for the contract, were also issues found against the plaintiffs in error by the trial court, and we think very properly so.

A right to repudiate a contract on the ground of fraud is not a right arising out of the terms of the contract itself, but is one accruing to the parties under the law, separate and apart from any condition named in the contract. In order that the plaintiffs in error might have availed themselves of this legal right, they should have, within a reasonable time after the discovery of the fraud, given to Nelson notice of the disaffirmance or rescission of the contract; that is, in some way have communicated to Nelson their election to rescind, and they should also have restored or offered to restore everything of value that they had received under the contract.
276 They could not rescind in part. The rescission must have been of the entire contract. They could not be allowed to rescind the contract and to retain any of the benefits derived therefrom. Nelson should have been put in *statu quo*.—American & English Enc. of Law, 2nd ed.; vol. 24, p. 645, and cases there cited.

There is no pretence that they had performed any of the requirements of the law in this regard. In the first place, the court's findings of fact are against this proposition; that is, that there was no fraud or fraudulent statements or misrepresentations on the part of Nelson. The record does not disclose that any claim of fraud was made until the filing of the answer. No notice is shown to have been given that they had rescinded the contract upon this ground. No effort or attempt was made to return the property or any part of it on this theory; but on the contrary, even up to the trial and

during the trial, the benefits accruing to the plaintiffs in error, they claimed the right to retain. As stated before, the rights of the parties arising under this head are separate and apart from anything contained in the contract itself, and if under the terms of the contract, the plaintiffs in error would be entitled to retain the benefits arising under the contract, that is, the income from the royalties, they would not be entitled to retain such benefits if they rescinded the contract upon the ground of fraud. In such case, they would be required to return everything received, including the royalties, and would be entitled to recover the $500.00 earnest money originally paid, together with proper damages, if any had accrued.

Upon the proposition that there was no consideration for the contract, little need be said. In order to entitle one to defend against a contract on the ground of a failure of consideration, the evidence must show something more than inadequacy of consideration. When, as in this case, the evidence shows that the parties seeking to rescind have enjoyed an income from the property, they are not entitled to rescind. The evidence in this case entirely fails to show a failure of consideration. There is no statement of any witness who testified that the property was entirely without value, while on the other hand, the evidence shows that during the nine months covering the period of the option of plaintiffs in error, they had received as their share an income from the property in the sum of about $500.00, and in addititon thereto, prior to the trial, a further sum of over $300.00. How can it be said that a property producing an income of over $800.00 in a year was wholly without value? This would be about sixteen per cent. on the investment, an amount that ordinarily would be considered a sufficient income on an investment, by the average financier.

Returning to the first defense (that the plaintiffs in error had elected to return the property prior to the fourth day of March, 1901, and had tendered the same back) notwithstanding the allegations of the answer that they had tendered the property to the defendant in error, and notwithstanding the finding of the court against them on the question of fact involved in this contention, the plaintiffs in error contend that under the law they were not required to return the property, or even to give notice of the fact that they had elected to avail themselves of their option and rescind the contract. This really is the most interesting proposition contended for by plaintiffs in error. The evidence on the part of the plaintiffs in error shows that on the third day of March, 1901, the day before their right to rescind expired they held a meeting among themselves and elected to rescind; that they instructed Mr. De Bois their attorney, to notify the defendant in error of their election. A very few days prior to this they had received a letter from the defendant in error, in which he stated that he would hold them to a strict compliance with the contract; that if they did rescind within the time provided in the contract, they should return him the property, and directed that they return it to Fort Smith, Arkansas.

appeal being taken from an opinion rendered in said cause in the Supreme Court of the Territory of Oklahoma, which is in words and figures as follows, to-wit:

Supreme Court of Oklahoma. Sept. 2, 1904.

GUSS et. al. v. NELSON.

OPTIONAL CONTRACT — RESCISSION — NOTICE — RETURN OF PROPERTY — RECORD ON APPEAL.

1. Where a contract is entered into at Guthrie, Okla., for the purchase of certain shares of stock of various mining companies with offices and place of business at Ft. Scott, Kan., the contract providing that it includes the delivery of the seals and all other records belonging to each of the companies, and a payment of $500 is made on the purchase price, which payment is to be considered as an option on all of said property until the 4th day of March, 1901, at which date the parties are to pay the vendor an additional sum of $4,500, or in lieu thereof turn back to the vendor all the property delivered by him, *held* that, in case the purchasers elect to recind and turn back to the vendor the property purchased under the option given them, in order to entitle them to the benefit of such option, they must notify the vendor within the time given of their election, and must return or offer to return all the property, certificates of stock, and records which were received by them.

2. Where such contract is entered into, and the purchasers on the day prior to the expiration of their option, at a meeting held in Guthrie, decided among themselves to rescind, and although they knew the address of the vendor, because of the vendor not being a resident of the territory of Oklahoma or having a place of business in the city of Guthrie, placed the certificates of stock in the Guthrie National Bank subject to the order of the vendor, and thereafter placed to his credit in such bank all the income received from the royalties of the property, *held*, not to be a compliance with the terms of the contract of rescission and return of property, which contract provided that, in case the purchasers should elect to rescind, they should "turn back to the vendor all the property delivered by him."

3. Where at the conclusion of a trial had before the court without a jury the court orally reviews the evidence and expresses its opinion upon the law and the facts involved in the case, and where there are no special findings of fact and conclusions of law asked for, and where the findings and judgment of the court are embodied in a journal entry, the oral opinion expressed by the court performs no office in a case-made, and cannot be considered by this court on appeal from a judgment of the trial court.

(Syllabus by the Court)

Error from District Court, Logan County; before Justice Jno. H. Burford.

Action by J. T. Nelson against U. C. Guss and others. Judgment for plaintiff, and defendants bring error. Affirmed.

John D. De Bois and Cotteral and Horner, for plaintiff's in error. W. R. Biddle, George S. Green. and Selwyn Douglas, for defendants in error.

PANCOAST, J. Action commenced in the district court of Logan County by the defendant in error against the plaintiffs in error to recover the sum of $4,500 upon the following contract:

"Memorandum of agreement made and entered into this 28th day of May, 1900, to wit, as follows: J. T. Nelson agrees on his part to turn over 25 per cent. of the capital stock of the following coal companies located in the Creek Nation. to wit: Sapulpa, Choctaw, Catoosa, Wewoka, Red Fork, Neyaka, Concharty, Tulsa, Car Creek and Broken Arrow Mining Companies, to the following persons: U. C. Guss. W. H. Gray, F. H. Greer and J. W. McNeal.

"The consideration of the delivery under which the above listed stock and other stock as hereinafter described is as follows: This also includes the delivery of the records belonging to each of said above named companies, the seals

and all other records that in any way belong to any of said companies. A payment of $500 is to be made in cash upon delivery of the above named property and additional property in the way of stock hereinafter listed. The $500 is to be considered an option on all said property until the 4th day of March. 1901. At that date the above named parties are to pay to Nelson an additional sum of $4.500.00 (Four thousand five hundred dollars) or in lieu thereof to turn back to said Nelson all the property delivered by him. In addition to the above mentioned 25 per cent. of capital stock aforosaid, which the said J. T. Nelson represents he owns in his own right, he agrees to turn over and deliver enough more stock to make the aggregate sum of stock delivered under this contract as follows:

Sapulpa	1,210 shares
Choctaw	369 shares
Catoosa	369 shares
Wewoka	369 shares
Red Fork	369 shares
Neyaka	368 shares
Concharty	369 shares
Tulsa	319 shares
Car Creek	368 shares
Broken Arrow	369 shares

"The $500.00 above mentioned is to be earnest money to be forfeited in case the balance of payment is not paid. Nelson also agrees to give U. C. Guss his proxy as director in each of the above named companies until such time as it may be convenient for him to resign, and Guss or some one else elected to fill the vacancy.

J. T. Nelson

"U. C. Guss
"W. H. Gray,
"J. W. McNeal,
"F. H. Greer,"

The record shows that under this contract Nelson shipped the property described in the contract by express from Ft. Scott, Kan., where the headquarters of the company were, to Guthrie, all the parties being at Guthrie, at the time the contract was signed, the residence of Nelson, however, being at either Ft. Smith, Ark., or Ft. Scott, Kan., the right of the plaintiff below to recover being based upon the theory that the defendants below had failed to turn back to Nelson the property delivered to them, and therefore under the contract, were bound to pay the remainder of the contract price of $4,500.

The defendants' answer to the petition was, first, a general denial; second, that the defendants had elected to tnrn the property back to the plaintiff prior to the date of the expiration of the option March 4, 1901, and had tendered the same back to the plaintiff; third, that the plaintiff had induced the defendants to enter into the contract through fraudulent misrepresentations; and, fourth, that there was no consideration for the contract. The trial was to the court without a jury. The findings of fact were general, and were in favor of the plaintiff below. The findings contained in the journal entry of judgment are in the following language: "And the court, after hearing all of the evidence and arguments of counsel, and being fully advised in the premises, finds for the plaintiff on all of the issues in this action, and finds that the defendants and each of them are indebted to said plaintiff upon the contract sued upon and set out in this petition in the sum of four thousand five hundred dollars, with interest thereon at the rate of seven per cent. per annum from the 4th day of March, A. D. 1901, and that the plaintiff is entitled to judgment against the said defendents therefor." Under this finding, every question of fact necessary to be found and upon which the judgment is based is in favor of the plaintiff in the action; and

following the rule so frequently laid down and universally adhered to by this court that, where there is evidence upon which a finding of fact may be based, this court will not disturb the finding unless it is manifestly wrong, we might very properly affirm this case without further discussion. However, some of the legal questions arising in the trial of the case below and discussed in the briefs in this case are so interesting, together with the fact that a considerable amount is involved, we think it may be well to notice some of the propositions contended for more in detail.

First, we think it proper to call attention to a question of practice that seems to be growing among certain members of the profession in the territory of inserting into a case-made matters of no importance, and which cannot be considered by this court. This practice serves only to make records more voluminous than they should be, and to add to this court's labor. The record in this case is not a large one, but it contains the oral decision of the court below when rendering its decision at the trial. This court, as well as the Supreme Court of Kansas, from which we take our civil procedure act, has repeatedly held that the oral decisions of the trial court have no office in a case-made, should not be included, and cannot be considered by the appellate court, when the finding and judgment of the court below are properly formulated into a record or written order. In this case the findings of fact and conclusions of law of the court below are contained in the journal entry. The oral decision of the judge at the conclusion of the trial cannot be considered by this court in any way. Notwithstanding this, the argument of counsel for plaintiff's in error is based almost entirely upon the oral statements of the trial court, and it is insisted that the court made no findings upon certain propositions, and that, therefore, this court is not obliged to reverse the trial court's findings in order to arrive at a conclusion as to certain of the facts contended for. These con-

tentions of the plaintiffs in error could not possibly avail anything, because this court is bound to look to the findings of fact as contained in the journal entry. A case-made should properly contain nothing but that which is necessary to enable the appellate court to pass upon the questions involved on appeal. Every question of fact under the general finding in this case is against the plaintiffs in error. Had they desired, special findings might have been made, and in such event the questions contended for and discussed in the briefs might have been properly presented to this court, if the special findings so warranted. The uncontradicted evidence shows that this contract was for the purchase of certain mining stocks of coal companies operating or to be operated in the Indian Territory. At the time of the contract the plaintiffs in error, or some of them, owned certain interests in these companies, or some of them, and desired to obtain a controlling interest, and in order to do so contracted to purchase a certain amount of stock from the defendant in error, which would give them control of the property and of the company. Included in the contract for the purchase of stock was a provision for the resignation of the defendant in error as director, the transfer of the books, papers, records, and seals of the companies, and the election of new directors. Some of the plaintiffs in error at the time of the contract were holding positions as officers of the company, and were familiar with the place where the business of the company was transacted and where the records were kept.

Now, to take up the first issue raised by the answer, "that the defendants had elected to turn said property back to the plaintiff prior to the 4th day of March, 1901, and had tendered the same back to the plaintiff." All questions of fact involved in this issue were decided by the court below in favor of the defendant in error, and, there being evidence sufficient upon which to base such a finding, this court un-

der the rule hereinbefore mentioned, will not disturb the same. We will, however, again refer to this issue later on.

The second issue raised by the answer, that plaintiff had induced the defendants to enter into said contract by fraudulent representations, and the third, that there was no consideration for the contract were also issues found against the plaintiffs in error by the trial court, and, we think, very properly so. A right to repudiate a contract on the ground of fraud is not a right arising out of the terms of the contract itself, but is one accruing to the parties under the law, separate and apart from any condition named in the contract. In order that the plaintiffs in error might have availed themselves of this legal right, they should have, within a reasonable time after the discovery of the fraud, given to Nelson notice of the disaffirmance or rescissiou of the contract; that is, in some way have communicated to Nelson their election to rescind, and they should also have restored or offered to restore everything of value that they had received under the contract. They could not rescind in part. The rescission must have been of the entire contract. They could not be allowed to rescind the contract and to retain any of the benefits derived therefrom. Nelson should have been put in statu quo. American & English Enc. of Law (2nd Ed.) vol. 24, p. 645, and cases there cited. There is no pretense that they had performed any of the requirements of the law in this regard.

In the first place, the court's findings of fact are against this proposition; that is, that there was no fraud or fraudulent statements or misrepresentations on the part of Nelson. The record does not disclose that any claim of fraud was made until the filing of the answer. No notice is shown to have been given that they had rescinded the contract upon this ground. No effort or attempt was made to return the property, or any part of it, on this theory; but, on the

contrary, even up to the trial and during the trial the benefits accruing to the plaintiffs in error they claimed the right to retain. As stated before, the rights of the parties arising under this head are separate and apart from anything contained in the contract itself, and if, under the terms of the contract, the plaintiffs in error would be entitled to retain the benefits arising under the contract—that is, the income from the royalties—they would not be entitled to retain such benefits if they rescinded the contract upon the ground of fraud. In such case they would be required to return everything received, including the royalties, and would be entitled to recover the $500 earnest money originally paid, together with proper damages, if any had accrued. Upon the proposition that there was no consideration for the contract, little need be said. In order to entitle one to defend against a contract on the ground of a failure of consideration, the evidence must show something more than inadequacy of consideration. When, as in this case, the evidence shows that the parties seeking to rescind have enjoyed an income from the property, they are not entitled to rescind. The evidence in this case entirely fails to show a failure of consideration. There is no statement of any witness who testified that the property was entirely without value, while, on the other hand, the evidence shows that during the nine months covering the period of the option of plaintiffs in error, they had received as their share an income from the property in the sum of about $500, and, in addition thereto, prior to the trial, a further sum of over $300. How can it be said that a property producing an income of over $800 in a year was wholly without value? This would be about 16 per cent. on the investment, an amount that ordinarily would be considered a sufficient income on an investment by the average financier.

Returning to the first defense (that the plaintiffs in error had elected to return the property prior to the 4th day of

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER, 1904, TERM.

U. C. GUSS, J. W. McNEAL, W. H. GRAY and FRANK H. GREER,

Appellants,

VS.

J. T. NELSON,

Appellee.

No.

NOTICE

To Green and Martin, Attorneys for Appellee in the Above Cause.

You are hereby notified that on Monday, the 6th day of February, 1905, the appellants will submit to the Supreme Court of the United States the foregoing motion for certiorari and diminution of the record, and for an order

asked for upon the Supreme Court of the Territory of O
homa, and the said motion will be submitted at the Ca
in the City of Washington, at the coming in of the c
on that day, or as soon thereafter as counsel can be h
upon printed briefs, a copy of which is made and se
herewith.

FRANK DALE,
A. G. C. BIERER,

Attorneys for Appellan

Service of the above and foregoing notice and of mo
and brief attached thereto is hereby accepted this 14th
of January, 1905.

GEO. S. GREEN,
H. B. MARTIN,

Attorneys for Appellee.

IN THE SUPREME COURT OF THE UNITED STATES.

U. C. GUSS, J. W. MCNEAL, W. H. GRAY AND FRANK H. GREER,
Appellants,

vs.

J. T. NELSON,
Appellee.

MOTION FOR CERTIORARI AND FOR DIMINUTION OF THE RECORD.

Come now the appellants in the above entitled cause and move the court for an order for a certiorari for diminution of the record in this cause, and for an order upon the Supreme Court of the Territory of Oklahoma to make and certify to this court in this cause a statement of the facts in the case in the nature of a special verdict. The appellants as grounds for this motion show:

That heretofore on the 24th day of October, 1904, the appellants filed their petition in the Supreme Court in the Territory of Oklahoma for an appeal in said cause to the Supreme Court of the United States, and presented the same to the Honorable John H. Burford, Chief Justice of said Supreme Court of Oklahoma Territory, and obtained an order for said appeal and for the issuance of citation and for stay of proceedings therein and for the certification of said cause by the Clerk of the Supreme Court of Oklahoma Territory to the Supreme Court of the United States, said

that regard, they became liable for the remainder of the p
chase price.

Having carefully examined the entire record in t
case, discovering no error therein, and believing that
correct judgment was entered, the judgment of the court
low is affirmed. All the justices concurring, exc
BURFORD, C. J., who tried the case below, not sitting.

UNITED STATES OF AMERICA, }
TERRITORY OF OKLAHOMA, } ss. In the Supreme Co

I, Benj. F. Hegler, Clerk of the Supreme Court of
Territory of Oklahoma, do hereby certify that the above
foregoing is a full, true and complete copy of the opinion
the cause of U. C. Guss, et al plaintiffs in error, vs. J.
Nelson, defendant in error, which opinion was rendered
the 2nd day of September, 1904, at the June, 1904 term
said Court.

In witness whereof, I have hereto set my hand and
fixed the seal of said Supreme Court, at Guthrie, this
day of September, 1904.

BENJ. F. HEGLER,
Clerk Supreme Cou

(Seal)

By Jessie Pardoe, Dep

Your appellants further shows to the court that such cause was tried originally in the District Court of Logan County, Oklahoma Territory, by the court and without a jury, and that no special findings of fact were made in said cause, and that the Supreme Court of the Territory of Oklahoma, in deciding said cause, did not make and set out at any time in said cause any statement of facts in the nature of a special verdict, and that some of the questions raised in said cause by the appeal of the appellants to this court and on which material questions will involve a consideration of the facts of said cause by the Supreme Court of the United States, and that the appellants will, under the law and the practice of said court, be unable to present the same unless a statement of facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence excepted to shall be made and certified by the Supreme Court of Oklahoma and transmitted to the Supreme Court of the United States, and that justice and an opportunity to appellants to fully present their cause require that such a statement of facts of the case in the nature of a special verdict be made and certified by the Supreme Court of the Territory of Oklahoma and transmitted to the Supreme Court of the United States; that on Nov. 10, 1904, and before the record in said cause was certified by the Clerk of the Supreme Court of the Territory of Oklahoma to the Clerk of the Supreme Court of the United States, appellants filed in the Supreme Court of Oklahoma Territory their application for certification by the Supreme Court of the Territory of Oklahoma of a statement of facts of the case in the nature of a special verdict, a true copy of which application is in words and figures, as follows, to-wit:

IN THE SUPREME COURT OF THE UNITED STATES.

U. C. GUSS, J. W. MCNEAL, W. H. GRAY AND FRANK H. GREER,
Appellants,

vs.

J. T. NELSON,
Appellee.

APPLICATION FOR CERTIFICATION BY THE COURT OF A STATEMENT OF FACTS OF THE CASE, IN THE NATURE OF A SPECIAL VERDICT.

Come now the appellants in the above entitled cause, and show to the Supreme Court of the Territory of Oklahoma that on the 24 day of October, 1904, they filed their petition in the Supreme Court of the Territory of Oklahoma for an appeal of said cause to the Supreme Court of the United States, and presented the same to the Honorable John H. Burford, Chief Justice of said Supreme Court of Oklahoma Territory, and obtained an order for said appeal and for the issuance of citation and for a stay of proceedings therein, and for the certification of said cause by the Clerk of the Supreme Court of Oklahoma to the Supreme Court of the United States, and that the Clerk is preparing a transcript of the proceedings and judgment and decree in said cause to the Supreme Court of the United States, in accordance with the laws of said appeal.

Your apppellants further show to the court that the said cause was tried upon issues joined in the District Court of Logan County, Oklahoma Territory, from whence the appeal was taken to the Supreme Court of the Territory of Oklahoma, and upon said trial, evidence was offered by both parties, but that no special findings of fact and no special verdict was made; that some of the questions raised in said cause, and which questions are material, will involve a consideration of the facts of said cause by the Supreme Court of the United States, and the appellants will under the law and the practice of said court, be unable to present the same unless a statement of the facts of the case in the nature of the a special verdict and also the rulings of the court on the admission or rejection of evidence excepted to shall be made and certified by this court and transmitted to the Supreme Court of the United States, together with the transcript of the proceedings and judgment and decree appealed from; that justice and an opportunity be given to the appellants to fully present their cause requires that such statement of facts of the case in the nature of a special verdict be made and certified by this court, and transmitted to the Supreme Court of the United States; that this application is not made for the purpose of delay, but in order that justice be done the appellants.

WHEREFORE the appellants pray the Supreme Court of Oklahoma to make a statement of facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence excepted to, and certify the same and transmit the same with the transcript of the proceedings and judgment and decree appealed from to the Clerk of the Supreme Court of the United States, and that inasmuch as the Supreme Court of the Territory of Oklahoma had adjourned before this appeal was taken, and will not, under the usual practice of said court, and the duties of the judges in their respective districts requiring them to

hold district courts in their respective districts at this se
of the year again be in session until about January 1,
that if said court cannot convene at once for the purpos
making said statement of facts, then an order be mad
the Chief Justice, directing the Clerk of the Supreme
of the Territory of Oklahoma to transmit to the Clerk o
Supreme Court of the United States a transcript of the
ceedings in said cause within the time required by law,
that the said statement of facts of the case in the nature
special verdict be made and certified by the Supreme
of the Territory of Oklahoma as soon as said court
session, and that the same be then promptly transmitt
the Clerk of the Supreme Court of the United States
filed with and become a part of the records and proceed
in said cause.

FRANK DALE,

A. G. C. BIERER,

Attorneys for Appel

TERRITORY OF OKLAHOMA; } ss
LOGAN COUNTY, }

A. G. C. Bierer, being first duly sworn, says that he is counsel and one of the attorneys for the plaintiffs in the above entitled cause; that he has read and knows the facts stated in the above and foregoing application and the statements therein contained are true.

Affiant further says that said application is not made for the purpose of delay, but that justice be done the appellants.

A. G. C. BIERER.

Subscribed and sworn to before me this 10th day of November, 1904.

BENJ. F. HEGLER,
Clerk of the Supreme Court of Oklahoma Territory

Endorsed:

Filed Nov. 10th, 1904.

BENJ. F. HEGLER,
Clerk Supreme Court.

UNITED STATES OF AMERICA,
TERRITORY OF OKLAHOMA, } ss

I, Benj. F. Hegler, Clerk of the Supreme Court of the Territory of Oklahoma, do hereby certify that the above and foregoing is a full, true and complete copy of the Application for Certification by the Court of a Statement of Facts of the Case, in the Nature of a Special Verdict now on file in my office in the case of U. C. Guss et al, vs. J. T. Nelson.

IN WITNESS WHEREOF, I hereto set my hand and affix the seal of said Supreme Court, at Guthrie, this 13th day of January, 1905.

BENJ. F. HEGLER,
[SEAL] *Clerk Supreme Court, Oklahoma Territory.*

And that on said date, the 10th day of November, 1904, the Honorable John H. Burford, Chief Justice of the Supreme Court of the Territory of Oklahoma, who had made the orders on the appeal in said cause to the Supreme Court of the United States made an order granting said application, and requiring that said statement of facts be made by the court when it should be in session in January 1905; that on the 6th day of January, 1905, appellants served upon the attorneys of J. T. Nelson, appellee, a statement of facts in said cause in the nature of a special verdict, covering the facts which appellants deemed material in the presentation of their cause in the Supreme Court of the United States, and which they asked the said Supreme Court of the Territory of Oklahoma to make and certify, a true copy of which order and statement of facts, duly certified by the Clerk of the Supreme Court of the Territory of Oklahoma, is in words and figures as follows, to-wit:

IN THE SUPREME COURT OF THE UNITED STATES.

U. C. GUSS, J. W. McNEAL, W. H. GRAY AND FRANK H. GREER,
Appellants.

vs.

J. T. NELSON,
Appellee.

No. 1394

ORDER

Now on this 10th day of November, 1904, come the appellants and made application to the Supreme Court of the Territory of Oklahoma to make a statement of the facts of the above cause in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence as excepted to in the trial of said cause in the District Court of Logan County, Oklahoma Territory, and certify the same and transmit the same to the Supreme Court of the United States, together with the transcript of the proceedings and judgment and decree rendered by the Supreme Court of Oklahoma in said cause, and upon consideration of said application, it is by the undersigned Chief Justice of the Supreme Court of the Territory of Oklahoma considered and adjudged, that,

WHEREAS, appellants' petition for appeal was filed and allowed in said cause to the Supreme Court of the United States on the 24th day of October, 1904, and the same must be filed in the Supreme Court of the United States within thirty (30) days from that date; and

WHEREAS, the Supreme Court of the Territory of Oklahoma adjourned *sine die*, its regular June, 1904 Term of said Court, and the Judges of said Court are all engaged

in holding terms of district court in their respective districts, as by law required, and will remain so engaged until about the 1st of January, 1905, when the Supreme Court of the Territory of Oklahoma will again assemble at the Capital of said Territory in the City of Guthrie, Oklahoma Territory for its regular January session of said court.

IT IS THEREFORE CONSIDERED AND ORDERED that the Clerk of the Supreme Court of Oklahoma Territory do transmit the transcript of the proceedings in said cause and the judgment and decree rendered therein by the Supreme Court of the Territory of Oklahoma to the Clerk of the Supreme Court of the United States within the thirty (30) days required by law, and that when the Supreme Court of Oklahoma Territory is in session in January 1905, the statement of the facts of said case in the nature of a special verdict, and also the rulings of the court on the admission and rejection of evidence excepted to shall be made and certified by said court, and transmitted to the Clerk of the Supreme Court of the United States, to be filed with the transcript of the proceedings and judgment and decree in said cause, as certified by the Clerk of the Supreme Court of the Territory of Oklahoma.

JOHN H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

Attest:

BENJ. F. HEGLER,
Clerk Supreme Court of the
[SEAL] *Territory of Oklahoma.*

Endorsed:
Filed Nov. 10th; 1904.
BENJ. F. HEGLER,
Clerk Supreme Court.

UNITED STATES OF AMERICA,
TERRITORY OF OKLAHOMA, } ss

I, Benj. F. Hegler, Clerk of the Supreme Court of the Territory of Oklahoma, do hereby certify that the above and foregoing is a full, true and complete copy of the order in the cause of U. C. Guss, et al vs. J. T. Nelson, now on file and of record in my office.

IN WITNESS WHEREOF, I hereto set my hand and affix the seal of said Supreme Court, at Guthrie, this 13th day of January, 1905.

BENJ. F. HEGLER,

[SEAL] *Clerk Supreme Court, Oklahoma Territory.*

March, 1901, and had tendered the same back), notwithstanding the allegations of the answer that they had tendered the property to the defendant in error, and notwithstanding the finding of the court against them on the question of fact involved in this contention, the plaintiffs in error contend that under the law they were not required to return the property, or even to give notice of the fact that they had elected to avail themselves of their option and rescind the contract. This really is the most interesting proposition contended for by plaintiffs in error. The evidence on the part of the plaintiffs in error shows that on the 3d day of March, 1901, the day before their right to rescind expired, they held a meeting among themselves, and elected to rescind; that they instructed Mr. De Bois, their attorney, to notify the defendant in error of their election. A very few days prior to this they had received a letter from the defendant in error, in which he stated that he would hold them to a strict compliance with the contract; that, if they did rescind within the time provided within the contract, they should return him the property, and directed that they return it to Ft. Smith, Ark. It is contended that, inasmuch as the defendant in error, Nelson, did not reside or have a place of business in Oklahoma, but did reside beyond the limits of the territory, all they had to do in order to fulfill the requirements of the law under the contract which was designated that they should return the property to Nelson was that they should simply elect to rescind, and that they were under no obligations either to return the property, or even to notify Nelson of the fact of their election; but, if they are mistaken in that position, that they did in fact notify Nelson of their election, and that the property was at the bank in Guthrie, and that, if they were required to do anything, that this was a sufficient compliance with that provision of the contract which required them to return the property. As stated before, the court found against the plaintiffs in error upon the ques-

tions of fact involved in this contention; that is to say, the court found as a matter of fact that De Bois did not write the letter or send the telegram, and that Nelson did not receive the letter or the telegram that De Bois claimed to have sent. The evidence upon this proposition being conflicting, this court will not disturb the finding.

This leaves the proposition resting upon the contention of plaintiffs in error that under the law they were not obliged to return the property or give notice of the election to rescind, and this because of the fact that the defendant in error did not reside within the territory, and had no place of business therein. Is this contention well taken, and do the authorities cited by plaintiffs in error sustain it? We think not. Each and every authority cited by the plaintiffs in error is based upon a rule of law that has no application to this case whatever. The cases cited by counsel are these: That where A. is indebted to B. upon a contract for the payment of money, made at a certain designated place, and no place of payment is mentioned in the contract, it is payable where made, and when B. resides beyond the limits of the realm—or, in other words, in this case, beyond the limits of the territory—that A. is not obliged to hunt B. up in order to pay him, but that, if he is ready, willing, and able to pay at the maturity of the contract, that is sufficient. We find no fault with the law laid down by the several courts cited by plaintiffs in error, but it is not applicable here. The propositions decided in those cases are not the propositions arising here. Those cases pertain only to questions of payment of simple contracts. They do not involve questions arising under the rights of rescission of contracts, or rights arising on optional contracts or questions arising under the provisions of contracts to return property. In this case the contract was for a sale of the mining stock mentioned and described therein. The delivery of the property together with the payment of $500 completed the

contract, and transferred the title to the plaintiffs in error, subject, however, to the right of plaintiffs in error to exercise their option either of paying the remainder of the purchase price or of rescinding the contract and returning the property. The right to return the property was a condition of the sale. It was a condition subsequent, the performance of which would have rescinded the obligation of plaintiffs in error to pay the purchase price. The performance of the option to return was subject alone to their election. The plaintiff below had no power whatever to prevent or effectuate it. It could only be performed by the voluntary act of the plaintiffs in error. If they failed to perform it, the conditions were discharged, and the promise to pay became absolute. Some affirmative act was necessary on their part in order to complete the recission; that is to say, the contract required them to return the property. The word "return" is very readily understood, and the plaintiffs in error could only be relieved from the obligation to return the property either by some act of the defendant in error or by some condition making it impossible to comply with the terms of the agreement. Stevens v. Hetzler (Ala.) 19 South. 838. The mere fact that the defendant in error did not reside nor have a place of business in the territory was not in itself sufficient to relieve the plaintiffs in error from the obligation to return. The rule of law governing and defining the duties of a party in returning property under an express provision in a contract to return, in optional contracts of this character, is much the same as in cases of recission of contracts where there is a breach of warranty. In the contract in this case, there is an express provision giving the plaintiffs in error the right to rescind, and that right is at the mere option of the parties. In case of a breach of warranty there is an implied right to rescind, which is not optional with the parties, but is conditioned upon the breach of the warranty. The duty of a party to give notice of disaffirmance of a contract,

and to return or offer to return the property, is the same in both instances, except that in cases arising under an implied right rescind the notice and to offer to return must be within a reasonable time, while in this case the time limiting the right to disaffirm, and within which the property was to be returned, is fixed by the contract itself. A & E. Enc. of Law, vol. 24, p. 645, and cases there cited; Carney v. Newberry, 24 Ill. 203; Neal v. Reynolds, 38 Kan. 432, 16 Pac. 785; Jeffries v. Forbes, 28 Kan. 174. The duty to return or offer to return the property and the duty to give notice of the disaffirmance of the contract is not controlled or obviated by reason of the party to whom the notice is due not residing within the limits of the state or territory. Where there is no express provision in the contract providing otherwise, the general rule is that the property shall be returned to the place where it was received when delivered under the contract. There may be some exceptions to this rule, but this case does not fall within the exception. The notice of disaffirmance must be given in both instances, and, as the parties were in communication with each other, and the plaintiffs in error had knowledge of the address of the defendant in error, of course the notice should have been addressed to such place; and, the defendant in error having notified the plaintiffs in error of the point to which he desired them to return the property, a return to such place on or before March 4, 1901, would have been a sufficient compliance with the contract.

It is not necessary to determine, and we do not determine, as to whether or not it was the duty of the plaintiffs in error to return the income from the royalties under the provisions of the option; but it was their duty, in case they elected to rescind, to notify the defendant of such election, and to return or offer to return to the place from which they received it, all of the certificates of stock, books, contracts, seals, and other paraphernalia pertaining to the property and the business. This they failed to do, and, failing in

"IN THE DISTRICT COURT OF LOGAN COUNTY OKLAHOMA, TERRITORY.

J. T. NELSON, *Plaintiff*,

vs.

U. C. GUSS, W. H. GRAY, J. W. McNEAL AND F. H. GREER, *Defendants*.

PETITION.

"Said petition for cause of action against said defendants says that on and prior to the 28th day of May, 1900, said plaintiff was the owner of a large number of shares of the capital stock of the following ten coal companies located in the Creek Nation: Sapulpa, Choctaw, Catoosa, Wewoka, Red Fork, Neyaka, Concharty, Tulsa, Gar Creek and Broken Arrow Mining Companies, and was in possession having an interest therein of a large number of shares in said companies.

"That he was also on said day a director in each of said companies and secretary of each of said companies and as such director and secretary he had possession of the records, seals and other property belonging to said companies; that the possession of said property was important.

"Plaintiff further says that on said 28th day of May, 1900, he entered into a contract in writing with said defendants to the effect that said plaintff would turn over to said defendants 25 per cent of the capital stock of said companies and would turn over the records, seals, and other property of said companies, including all the records that in any way belonged to said companies; that he would also give said defendant, U. C. Guss, his proxy as director in each of the above named companies or resign as such director.

"Said contract also provided that in consideration of the delivery of said property to said defendants and his resignation as aforesaid, that said defendants would pay him, plaintiff, $500 in cash; the $500 to be considered an option on all of said property until the 4th day of March, 1901 and that on that day the said defendants were to pay to said plaintiff an additional sum of $4,500, or in lieu thereof to turn back to said J. T. Nelson all the property delivered by him to said defendants. A copy of said contract is hereto attached, marked "Exhibit A" and made a part of this petition; reference being made to the terms thereof.

"Plaintiff further says that said defendants paid to said plaintiff the sum of $500 and that said plaintiff duly complied with all of the terms of said contract to the satisfaction of said defendants, turning over to them the stock, records, seals and other property belonging to said companies.

"Plaintiff further says that said defendants failed to return said property to him on the 4th day of March, 1901, and refused to return said property to him but have converted the same to their own use and have failed and neglected to pay said $4,500 on said 4th day of March, 1901, as they were bound to do by said contract. That there is now due from said defendants to said plaintiff the sum of $4,500 with interest thereon from the 4th day of March, 1901.

"Wherefore, plaintiff demands judgment for the sum of $4,500 with interest thereon from March 4th, 1901, and costs.

W. R. BIDDLE &

DOUGLAS & DOUGLAS,

Attorneys for Plaintiff."

The memorandum of agreement heretofore set forth as a part of this statement was attached to said petition as Exhibit "A" and made a part thereof.

17: Thereafter the defendants filed in said court their answer to said petition, which contained, First: a general denial; Second: admission that on the 28th day of May, 1900, the plaintiff was in possession of the shares of stocks, records, seals and other property belonding to the coal companies referred to in plaintiff's petition; that the contract was entered into, as set forth in the memorandum of agreement attached to plaintiff's petition; that the plaintiff turned over and delivered to them the properties mentiond in such memorandum or agreement, the payment of the $500, but alleged that the memorandum of agreement was not intended to present the full and complete contract between the parties, but was merely intended as a memorandum indicating in a general way the nature of the contract; that prior to March 4th, 1901, the date when said contract expired, they notified the plaintiff that they did not desire to make payment of the $4,500, the balance due on said contract, but desired to turn back to plaintiff all of said stock and other property mentioned in the petition, and that they were ready and willing to deliver and turn back said property to plaintiff; that on April 1st, 1901, the plaintiff not having appeared to receive said property, or sending any other person to receive it, and defendants not wishing to be chargeable with the property, expressed all of the shares of stock to the plaintiff at Ft. Smith, Ark., and also wrote said plaintiff inquiring as to what disposition they should make of the books, seals and other property turned over to them by plaintiff; that plaintiff wrongfully refused to take said shares of stock out of the express office and that defendants have at all times been ready and willing to turn said property back to plaintiff, and are now ready and willing to do so, and by their answer tender to plaintiff all of said property. A third defense is also urged, stating and setting forth that the plaintiff fraudently induced the defendants to enter into the contract by representing that all the said leases were in

full force and effect, and that said coal companies had complied with all the requirements of law both of the Creek and Muskogee Nations, and of the Federal statutes, and had also complied with all the provisions and requirements made and prescribed by authority of law and the Secretary of the Interior and Commissioner of Indian Affairs of the United States, and that they had done work and made improvements upon all the lands covered by said leases, and that said companies had prospected for and discovered coal upon all lands covered by said leases; that one of the mines was producing twenty (20) carloads of coal per day; and it is alleged by defendants in their answer that the representations of the plaintiff with reference to the validity and existence of the leases and of the daily output of the Tulsa Mine were false, and made to induce the defendants to enter into the contract; and it is further alleged in the answer that the companies did not have valid and subsisting leases save and except one of nine hundred forty (940) acres, and that all of the leases, if any were in existence prior to the time of making the contract, had expired before such contract was entered into. To this the plaintiff replied by general denial, and the further allegation that the defendants had examined all of the records with reference to the coal companies before they entered into the contract.

18: That on the first day of April, 1901, and within 27 days from March 4, 1901, U. C. Guss, W. H. Gray, J. W. McNeal and F. H. Greer sent to J. T. Nelson at Ft. Smith, Arkansas, all of the stock, books, records, seals, resignations, and other property of said coal companies which had heretofore been received under said contract mentioned in finding number four hereof by them from the said J. T. Nelson. The said J. T. Nelson declined to receive the same, and returned said articles to the said U. C. Guss, W. H. Gray, J. W. McNeal and F. H. Greer, and said parties have never been asked for said property, or said articles, or any part thereof, by the said J. T. Nelson, and have never re-

fused to turn over or deliver the same to said J. T. Nelson, or to deliver any of the things received by them from the said J. T. Nelson under said contract set out in finding number four hereof.

IN WITNESS WHEREOF I have hereunto affixed the signature of the Supreme Court of the Territory of Oklahoma and duly caused the Clerk of said court to attach the seal thereof hereto this ..... day of January, 1905.

SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

By .....
Associate Justice.

Attest:

.....
Clerk.

Service of the above statement hereby accepted this 6th day of January, 1905.

GREEN AND MARTIN,
Attorneys for J. T. Nelson, Appellee.

Endorsed:—Filed January 6, 1905.—Benj. F. Hegler, Clerk Supreme Court.—By Jessie Pardoe, Deputy.

UNITED STATES OF AMERICA, }
TERRITORY OF OKLAHOMA. } ss:

I, Benj. F. Hegler, Clerk of the Supreme Court of the Territory of Oklahoma, do hereby certify that the above and foregoing is a full, true and complete copy of the Statement of Facts in the Nature of a Special Verdict, now on file in my office in the cause of U. C. Guss et. al. vs. J. T. Nelson.

IN WITNESS WHEREOF, I hereto set my hand and affix the seal of said Supreme Court, at Guthrie, this 13th day of January, 1905.

BENJ. F. HEGLER,
(SEAL) Clerk Supreme Court, O. T.

That the said facts presented in said statement are material, and all of them are shown by the evidence in said cause, and the Supreme Court of the Territory of Oklahoma should have found the facts in accordance therewith, or at least should have made findings on said questions, and the facts as thus presented, all appear in the evidence in the case which was presented in the case made in said cause to the Supreme Court of the Territory of Oklahoma, and as appears more particularly and fully in the transcript of the evidence in this cause, certified by the Clerk of the Supreme Court of the Territory of Oklahoma to the Supreme Court of the United States, and which is now on file in the office of the Clerk of the Supreme Court, in this cause.

Appellants further show to the court that on the 11th day of January, 1905, the Supreme Court of the Territory of Oklahoma, upon considering said application of the plaintiffs for certification of the statement of facts in the case in the nature of a special verdict, and upon consideration of said statement of facts as presented by counsel for appelants to the Supreme Court of the Territory of Oklahoma, denied said application and declined to make any statement of facts for the reason that the statement of facts made, in the opinion of the court, sufficiently states the facts in said cause, a true copy of the Journal Entry of which judgment of the Supreme Court of Oklahoma, duly certified by the clerk of said court, is in words and figures as follows, to-wit:

IN THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

U. C. GUSS, J. W. MCNEAL, W. H. GRAY AND FRANK H. GREER, *Plaintiffs in Error*,
vs.
J. T. NELSON, *Defendant in Error*.

No. 1394.
JOURNAL ENTRY.

Now on this 11th day of January, 1905, this cause comes on for decision upon the application of the plaintiffs in error in this cause, appellants in the Supreme Court of the United States, for a statement of facts of the cause in the nature of a special verdict, which application was filed in this court on the 10th day of November, 1904, and the court after considering said application, orders that the same be refused for the reason that the opinion rendered in this cause sufficiently states the facts therein, to which ruling and decision of the court plaintiffs in error, appellants, U. C. Guss, J. W. McNeal, W. H. Gray and Frank H. Greer duly except.

UNITED STATES OF AMERICA,
TERRITORY OF OKLAHOMA, } ss.

I, Benj. F. Hegler, Clerk of the Supreme Court of the Territory of Oklahoma, do hereby certify that the above and foregoing is a full, true and complete copy of the Journal Entry of January 11, 1905, in the cause of U. C. Guss et al., vs. J. T. Nelson, as the same remains on file and of record in my office.

IN WITNESS WHEREOF, I hereto set my hand and affix the seal of said Supreme Court, at Guthrie, this 13 day of January, 1905.

BENJ. F. HEGLER,
Clerk Supreme Court, O. T.

(SEAL)

Your appellants show to the court that there are material assignments of error which they have made and filed with their petition for an appeal in this cause to this court and which now appear with the record, as certified to this court, which they cannot present. under the law and the practice of this court, without a statement of facts in the nature of a special verdict; and that justice and equity cannot be done in this cause and the law properly applied thereto and this cause properly presented to this court without such statement of facts in the nature of a special verdict.

Wherefore appellants pray to this court to make an order for a certiorari for diminution of the record in this cause, ordering and directing the Supreme Court of the Territory of Oklahoma to make from the evidence as presented to the Supreme Court of the Territory of Oklahoma, in said cause, a statement of facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence excepted to and certify the same and transmit the same to the Clerk of the Supreme Court of the United States, in order that the same may be made a part of the record in same cause, and printed with the printed record when the same is printed, and that the appellants be in no way prejudiced by the delay in the certification and transmission of said statement of facts in the nature of a special verdict.

Appellants further show that this application is not made for delay, but that justice may be done them.

FRANK DALE,

A. G. C. BIERER,

Attorneys for Appellants.

IN THE SUPREME COURT OF THE UNITED STATES.

U. C. GUSS, J. W. McNEAL, W. H. GRAY AND F. H. GREER,
Appellants,

vs.

J. T. NELSON,
Appellee.

No. 1394.

STATEMENT OF FACTS IN THE NATURE OF A SPECIAL VERDICT.

The Supreme Court of the Territory of Oklahoma hereby makes and certifies to the Supreme Court of the United States on appeal in the above entitled cause the following statement of facts of the above cause in the nature of a special verdict instead of the evidence at large therein, and hereby certifies that the facts in said cause are as follows, to-wit:

1: That in the year 1896 the Sapulpa, Choctaw, Catoosa, Wewoka, Red Fork, Neyaka, Concharty, Tulsa, Gar Creek and Broken Arrow mining companies were incorporated and organized under the laws of the Creek Nation, in the Indian Territory.

2: That in March, 1896, each of said companies took lease on coal lands in said Creek Nation, of one-hundred thousand (100,000) acres each, except the Tulsa Company, whose lease covered one-hundred twenty thousand (120,000) acres.

3: That in June, 1898, the Tulsa Company sub-leased its properties to the Kansas & Texas Coal Company for a period of five (5) years, in consideration of ten (10c) cents per ton on all coal mined.

4: That on and prior to the 28th day of May, 1900 J. T. Nelson, plaintiff in the court below, was in possession of certain shares of stock and of certain records, seals and other property belonging to said coal companies, and on said date said J. T. Nelson made and entered into a contract in writing with U. C. Guss, W. H. Gray, J. W. McNeal and F. H. Greer, at the City of Guthrie, in Oklahoma Territory, which contract is in words and figures as follows, to-wit:

"Memorandum of agreement made and entered into this 28th day of May, 1900, to-wit, as follows:

"J. T. Nelson agrees on his part to turn over 25 per cent. of the capital stock of the following coal companies located in the Creek Nation, to-wit: Sapulpa, Choctaw, Catoosa, Wewoka, Red Fork, Neyaka, Concharty, Tulsa, Gar Greek and Broken Arrow Mining Companies to the following persons: U. C. Guss, W. H. Gray, F. H. Greer and J. W. McNeal

"The consideration of the delivery under which the above listed stock and other stock as hereinafter described is as follows:

"This also includes the delivery of the records belonging to each of said above named companies, the seals and all other records that in any way belong to any of said companies. A payment of $500 is to be made in cash upon delivery of the above named property and additional property in the way of stock hereinafter listed. The $500 is to be considered an option on all said property until the 4th day of March, 1901. At that date the above named parties are to pay to Nelson an additional sum of $4,500 (Four thousand five-hundred dollars) or in lieu thereof to turn back to said Nelson all the property delivered by him. In addition to the above mentioned 25 per cent. of capital stock aforesaid,

which the said J. T. Nelson represents he owns in his own right, he agrees to turn over and deliver enough more stock to make the aggregate sum of stock delivered under this contract as follows:

Sapulpa - - - - -	1,210 shares;
Choctaw - - - - -	369 shares;
Catoosa - - - - - -	369 shares;
Wewoka - - - - - -	369 shares;
Red Rock - - - - -	369 shares;
Neyaka - - - - - -	368 shares;
Concharty - - - -	369 shares;
Tulsa - - - - - - -	319 shares;
Gar Creek - - - -	368 shares;
Broken Arrow - -	369 shares.

"The $500 above mentioned is to be earnest money to be forfeited in case the balance of payment is not paid. Nelson also agrees to give U. C. Guss his proxy as director in each of the above named companies until such time as it may be convenient for him to resign, and Guss or some one else elected to fill the vacancy.

U. C. GUSS. J. T. NELSON.
W. H. GRAY.
J. W. MCNEAL.
F. H. GREER."

5: That after making and entering into said contract, none of the above mentioned and described leases were ever delivered by the said J. T. Nelson to the said U. C. Guss, W. H. Gray, J. W. McNeal or F. H. Greer, except the sub-lease of the Tulsa Company to the Missouri & Texas Coal Company.

6: That under and in pursuance to this contract Nelson shipped the property described therein, except the leases referred to, by express from Ft. Scott, Kansas, where the headquarters of the company were, to Guthrie, all of the parties being at Guthrie at the time the contract was signed.

7: That under and in pursuance to said contract the said U. C. Guss, W. H. Gray, J. W. McNeal and F. H. Greer paid to said Nelson the sum of Five Hundred ($500) Dollars.

8: That at and subsequent to the time when said contract was made and entered into between said parties, the place of residence of said Nelson was at Ft. Scott, Kansas, and also at Ft. Smith, Arkansas.

9: That the said Nelson did not induce the said U. C. Guss, W. H. Gray, J. W. McNeal or F. H. Greer, or any of them to enter into said contract through any deceit or fraudulent misrepresentations.

10: That there was ample and sufficient valid consideration running from the said Nelson to the said U. C. Guss, W. H. Gray, J. W. McNeal and F. H. Greer for the execution of said contract.

11: That on the 1st day of March, 1901, the said J. T. Nelson addressed a letter to John D. BeBoise, at Guthrie, Oklahoma, wherein he acknowledged a communication from DeBoise of the 26th instant, and one of March 1st from McNeal. In this letter, however, J. T. Nelson stated that he would want them (referring to the appellants herein) to abide by the agreement by either sending the money or the stock, books, seals and resignation of the officers which they had elected. No other or subsequent demand for either the money or the stocks, securities, seals, etc., was ever made by J. T. Nelson, or any person acting for him, upon the appellants herein, defendants below, on or subsequent to March 4, 1901, the date when the contract expired and prior to the commencement of the action below for the recovery of the money.

12: No claim is made by the appellee, J. T. Nelson, that he ever made a demand of any kind upon the appellants for payment of the money or a return of the stock, books,

seals, and the resignation of the officers after the date, to-wit: March 4, 1901, the time fixed in the contract for its expiration, and at which fixed time appellants here, defendants below, should, under the terms of their contract, elect to pay the money or return the properties above mentioned. Neither is it contended by the plaintiff in his testimony or proof that such demand was made.

13: That the said U. C. Guss, W. H. Gray, J. W. McNeal and F. H. Greer did never at any time prior to the 4th day of March, 1901, return or offer to return to the said Nelson at the City of Guthrie, Oklahoma Territory, the City of Ft. Scott, Kansas, or at the City of Ft. Smith, Arkansas, or at any other place, the certificates of stock, books, contracts, seals and other paraphernalia pertaining to the property and business of said companies, which under and in pursuence to said contract they had received from said Nelson.

14: That the said U. C. Guss, J. W. McNeal, W. H. Gray and F. H. Greer were on and after the 4th day of March, 1901, ready and willing at all times to return and deliver said property of said companies to said J. T. Nelson at said City of Guthrie, Oklahoma Territory, Ft. Scott, Kansas, or Ft. Smith, Arkansas, or at any other place at which the said J. T. Nelson would accept the same.

15: That upon said stock and property being turned over and delivered to the said U. C. Guss, W. H. Gray, J. W. McNeal and F. H. Greer, they assumed control and management of said property, and were to receive and retain all royalties earned by the said Tulsa Company up until the 4th day of March, 1901, and that they received, in pursuance to said contract, all of said royalties up to said date, amounting to Five Hundred ($500.00) Dollars, and retained and kept the same as between them and the said J. T. Nelson they had stipulated and provided; and all royalties by them received on and after the 4th day of March, 1901, a-

mounting to Three Hundred ($300.00) Dollars were by them deposited in the Guthrie National Bank, at Guthrie, Oklahoma Territory, to the credit of the said J. T. Nelson, and said royalties last mentioned were at all times thereafter subject to the check and claim of said J. T. Nelson.

16; That on the 21st day of September, 1903, the said J. T. Nelson institued his suit in the District Court of Logan County, Oklahoma Territory, against the said U. C. Guss, J. W. McNeal, W. H. Gray and F. H. Greer, by filing therein his petition, which said petition is in words and figures as follows, to:wit:

Supreme Court of Oklahoma Territory did little more in most instances than base its judgment upon the fact that the trial court had heard the evidence in the case and found the issues for the plaintiff and against the defendants. As before suggested, the finding made by the district court was only a general finding. There is nothing presented in record that could be taken by this court as a finding of fact in the nature of a special verdict, or in other words, as special findings of fact. A general finding of all issues against a party certainly cannot constitute a special verdict, and the 1874 act contemplated that there should be transmitted to this court, not a general finding of fact, which would leave this court little if anything to consider, but that the court should certify specifically, separately, and in detail, the facts of the case as presented by the proof, and in lieu of the proof, that this court can say whether the law has been correctly applied thereto.

We very respectfully ask that the court make the order prayed for.

FRANK DALE,

A. G. C. BIERER,

Attorneys for Appellants.

FILE COPY.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1905.

Office Supreme Court U. S.
FILED
NOV 27 1905
JAMES H. McKENNEY,
Clerk

NO. 124.

U. C. GUSS, J. W. McNEAL, W. H. GRAY and FRANK H. GREER,
Appellants and Plaintiffs in Error,

vs.

J. T. NELSON,
Appellee and Defendant in Error.

Appeal from and in Error to the Supreme Court of the Territory of Oklahoma.

BRIEF OF PLAINTIFF IN ERROR

FRANK DALE,
A. G. C. BIERER,
Attorneys for Appellants and Plaintiffs in Error.

THE STATE CAPITAL CO., GUTHRIE, OKLAHOMA.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1905.

U. C. GUSS, J. W. McNEAL, W. H. GRAY and FRANK H. GREER,
Appellants and Plaintiffs in Error,
vs.
J. T. NELSON,
Appellee and Defendant in Error.

NO. 124

Appeal from and in Error to the Supreme Court of the Territory of Oklahoma.

STATEMENT OF FACTS.

On the 28th day of May, 1900, at the city of Guthrie, Logan County, Oklahoma Territory, J. T. Nelson as one party and U. C. Guss, W. H. Gray, J. W. McNeal and Frank H. Greer as the other parties, entered into the following contract: (p. 17.)

"Memorandum of agreement made and entered into this 28th day of May, 1900, to-wit, as follows: J. T. Nelson agrees on his part to

TERRITORY OF OKLAHOMA, }
LOGAN COUNTY. } ss:

Frank H. Greer, being first duly sworn, deposes and says that he is one of the appellants in the above entitled cause; that he has read and knows the contents of the above and foregoing motion and aplication, and the statement of fact therein contained are true.

FRANK H GREER.

Subscribed and sworn to before me this 14th day of January, 1905.

LIZZIE CANFIELD.

[SEAL] *Notary Public.*

Commission expires Aug. 22, 1908.

BRIEF IN SUPPORT OF MOTION FOR CERTIORARI AND DIMINUATION OF THE RECORD, AND FOR ORDER ON THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA TO MAKE A STATEMENT OF FACTS OF THE CASE IN THE NATURE OF A SPECIAL VERDICT.

A part of section 2 of the Act of April 7, 1874, Vol. 1, Supp. Rev. St. U. S., page 8, covering appeals to the Supreme Court of the United States from the Supreme Courts of territories, is as follows:

"Provided, That on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below, and transmitted to the Supreme Court together wrth the transcript, of the pro-

ceedings and judgment or decree; but no appellate proceedings in said Supreme Court, heretofore taken upon any such judgment or decree, shall be in validated by reason of being instituted by writ of error or by appeal."

This act in itself is so clear as to need no construction or discussion. It indicates clearly that a statement of facts of the case in the nature of a special verdict and the rulings of the court on the admission and rejection of evidence "SHALL BE MADE AND CERTIFIED BY THE COURT BELOW AND TRANSMITTED TO THE SUPREME COURT." Now that means that the court below, the Supreme Court of the Territory, and not some other court, shall make and certify this statement of facts.

The Supreme Court may make these statements of facts by the affirmance of findings of fact of the District Court, as was held in Cannon vs. Pratt, 99 U. S., 619-21-22, where the court said:

"When the Supreme Court affirms the judgment of the district court upon findings of fact made by the district court the Supreme Court, in effect, adopts such findings as its own, for the purposes of appeal to this court."

But in the case at bar, the District Court did not make any findings of fact. There was simply the ordinary general finding for the plaintiff. There were no findings of fact in the nature of a special verdict, as Congress has provided "SHALL BE MADE AND CERTIFIED BY THE COURT BELOW" when appeal is taken from the Supreme Court of a territory to the Supreme Court of the United States.

In the case of Hecht vs. Broughton, 105 U. S., 235-236, the Supreme Court, Mr. Chief Justice Waite, said:

"We are not to consider the testimony in any case. Upon a writ of error we are confined to the bill of exceptions, or questions of law otherwise presented by the record; and *upon an appeal to the statements of facts and rulings certified by the court below.*"

And in the case of Davis vs. Fredericks, 104 U, S., 618-19, the Supreme Court, speaking again by Mr. Chief Justice Waite; said:

"As such appeals lie to this court only from the Supreme Court of a territory (Rev. Stat. sec. 702), it follows that *the statement both as to facts and rulings, on which we are to act*, MUST BE MADE DIRECTLY OR INDIRECTLY BY THAT COURT."

So that it would seem clear, not only by the plain provisions of the statute, but by the decisions under it, that the statement of facts in the nature of a special verdict must be made by the Supreme Court of the Territory, and the act in question makes it the imperative duty to certify the facts in detail.

Our motion, duly verified in this case, and the record, the transcript certified to this court from the Supreme Court of the Territory of Oklahoma, shows that no findings of facts were made by the District Court, and that there were no special findings in the nature of a special verdict for the Supreme Court of the Territory of Oklahoma to revert to in this case, as it affirmed the judgment of the District Court, and the opinion of the Supreme Court of the Territory of Oklahoma made no findings of fact in the nature of a special verdict, and the opinion of that Supreme Court, which is copied in the motion which we have presented and filed in this case, shows that that court has made no findings of fact which this court will, in our judgment, be willing to accept as a statement of the facts made from the quite voluminous evidence taken in the trial court and certified in the case made, as is the practice in Oklahoma and the Supreme Court of that Territory.

In the case of Stringfellow vs. Cain, 99 U. S., 610, the Supreme Court said:

"It is proper for the Supreme Court itself to state the facts established by the evidence and render the judgment which ought to have been rendered by the district court."

The court in that case further held in that opinion, that where the Supreme Court of a territory reversed the judgment of the district court because the findings of fact made by the district court were not sustained by the evidence, it was unneccary to go through the circuity of action of sending the case back to the district court to make other findings of fact "in order to put the case in a situation for review in this court." The court further said:

"The district court could do no more than find the facts which, in the opinion of the Supreme Court, should have been found before, and the judgment which should follow from these facts may just as well be settled by the Supreme Court on the first appeal as on the second. We conclude, therefore, that the case is properly here for decision upon the facts stated by the Supreme Court."

And so in this case at bar, although the judgment of the district court was affirmed. yet there were no findings of fact made by the district court which the Supreme Court of Oklahoma could affirm, and so the Supreme Court of Oklahoma must of necessity make a certified statement of facts of the case in the nature of a special verdict, in order that appellants may have this case considered upon the facts which the evidence presents under the April 7, 1874, act herein referred to.

There are a great many other cases in the Supreme Court of the United States where this question had been considered. Among them are:

Idaho Land Co. vs. Bradbury, 132 U. S., 509-514;
Marshall vs. Burtis, 172 U. S., 630-35;
Gray vs. Howe, 108 U. S., 12-13;
Salina Stock Co. vs. Salina Creek Co., 163 U. S., 109-17-18;
Zeckendorf vs. Zeckendorf, 171 U. S., 686;
Cohn vs. Daley, 174 U. S., 539-44-45;
Cameron vs. Pratt, 99 U. S., 619-21-22;
Thompson vs. Ferry, 180 U. S., 484-5;
Stone vs. United States, 164 U. S., 380-3;
Saltonstal vs. Burtwell, 150 U. S., 417-19.

We call the court's especial attention to the cases of Cohn vs. Daley and Thompson vs. Feery, supra, in which cases the court considered so-called statements of facts, which appear to have been deemed by the Supreme Court of Arizona Territory sufficient and as complying with the rule so clearly and unmistakably declared in the 1874 act under consideration, but in which cases this court held such statements of facts not to be a compliance with the statute, and refused to review the cases. We do not wish our clients left in any such position in this case, and in order to avoid such a catastrophe, we have asked the Supreme Court of Oklahoma to make what we believe this court will consider a compliance with the statute, and we are certainly entitled to the statment under these clear decisions of this court.

In the case of Stone vs. United States, supra, this court held that it was not at liberty to refer to the opinion for the purpose of eking out, controlling or modifying the scope of the findings and so we claim in this case that even though the opinion in this case may state some of the facts, the most casual consideration of the evidence, which has been certified by the Clerk to this court, will show that the opinion does not pretend to comprehend all the facts of this case, and there are numerous facts proven by the evidence beyond controversy, and which any court exercising a degree of conscience, candor and fairness which all courts exercise, must necessarily find in making the statement of the facts of the case like or in the nature of a special verdict, and it is upon these facts which are established clearly by the evidence, but not found in the opinion of the Supreme Court of Oklahoma, upon which we wish partly, at least, to present the law under our assignments of error in this case.

We would be more than willing, if the law permitted, to submit this case to this court upon the same record upon which the case was submitted to the Supreme Court of the Territory of Oklahoma, but we feel confident, under the de-

cisions of this court, that we cannot ask this court to review the evidence submitted in the case made from the district court of Logan County, Oklahoma, to the Supreme Court of the Territory of Oklahoma, and to make its own findings of fact therefrom. This court has frequently declined to do this, under the 1874 act, and while the practice in Kansas, from which Oklahoma took its present code, and therefore in Oklahoma is to incorporate into the case made all of the evidence instead of requiring the trial court to make findings of fact and conclusions of law separately, that practice is not permitted in this court, and therefore we are required to present to this court the facts of the case in the nature of a special verdict, or of special findings of fact, and it being by this appeals act the imperative duty of the Supreme Court of the Territory to make this statement of facts and the Supreme Court of the Territory having refused and declined to make this statement of facts, we must of course present our application to this court for an order upon the Supreme Court of Oklahoma to perform the duty enjoined upon it by the 1874 act. Our motion and the proof in support thereof shows that we have done all in the Supreme Court of Oklahoma that we can do. We have courteously and respectfully requested that court to make this statement of facts and certify it to this court. If this court should now deny our relief, it would be equivalent, in this case practically, to denying our right of appeal at all from the Supreme Court of Oklahoma.

We very respectfully suggest that the ground upon which the Supreme Court of Oklahoma has based its refusal to grant our application for this relief is untenable. A perusal of the opinion of the court, which we have certified in our motion and which is printed in the printed motion, when considered in the light of the assignments of error made and filed in this cause for a review of the decision of the Supreme Court of Oklahoma Territory, shows that the

Fifth. Because said court erred in ruling and deciding that under the contract sued upon by J. T. Nelson, appellee, in his suit against the appellants in this cause, some affirmative act was necessary on the part of the appellants in order to exercise their election. under their optional contract, not to purchase the property, the subject of the contract.

Sixth. Because said court erred in ruling and holding and adjudging that the failure of the appellants to return the property the subject of the contract in controversy, on or before the time stipulated, the 4th of March, 1901, bound them to the payment of the balance of the price fixed under said contract, of forty-five hundred ($4,500.00) dollars.

Seventh. Because said court erred in holding that said contract required appellants to return property on the 4th day of March, 1901, and that because of their failure to return said property they were to be held liable for the balance of the price stipulated in the contract; whereas, the court should have held that such failure entailed upon them the forfeiture of the earnest money paid upon said contract, and as therein provided.

Eighth. Because said court erred in finding and holding these appellants liable to the appellee for the sum of money sued for, solely because of their failure to return the stock, records and seals of said corporations on the 4th of March, 1901; whereas, there is nothing to show that on or after the 4th of March, 1901, the said appellee ever demanded or requested the return of said property, and the undisputed evidence does show that the same was returned and sent to the said J. T. Nelson shortly after said date, and he refused to receive the same.

Ninth. Because said court erred in ruling and holding that in

the contract sued upon in this cause in the courts of Oklahoma, there is an express provision giving plaintiffs in error there, appellants here, the right to rescind, and that right is a mere option of the party, in this: That said holding and decision shows that said court misconstrued said contract and took the wrong theory thereof, and held that a recission was necessary to relieve appellants from the payment of the sum stipulated, forty-five hundred ($4,500.00) dollars; whereas, their mere failure to meet the terms of the contract to pay the sum of forty-five hundred ($4,500.00) dollars would, by its terms, relieve them from further liability, but entail a loss and forfeiture upon their part, of the five hundred ($500.00) dollars paid on said contract.

Tenth. Because said court erred in its ruling and decision that under the contract sued upon by appellee in this cause, it was the duty of the appellants to return or offer to return the property, and to give notice of their disaffirmance of the contract, and to return said property to the appellee at some other place than the place where appellants received it, to-wit, at the city of Guthrie.

Eleventh. Because said court erred in ruling and holding that it was the duty of appellants under the contract sued upon in this case, to elect to rescind said contract and to notify the appellee (defendant in error in the Oklahoma court) of such election, and to return or offer to return to the place from which they received it, all of the certificates of stock, books, contracts, seals and other paraphernalia pertaining to the property and business and that because of such failure, they became liable for the remainder of the purchase price under said contract, to-wit, the sum of forty-five hundred ($4,500.00) dollars, with interest thereon.

Twelfth. Because said court erred in ruling, holding and adjudg-

ing that the judgment entered by the district court of Logan county, Oklahoma Territory was correct and in affirming said judgment.

ARGUMENT.

I.

THE SUPREME COURT OF OKLAHOMA ERRED IN HOLDING THAT IT WAS NECESSARY FOR THE APPELLANTS TO NOTIFY NELSON THAT THEY ELECTED NOT TO PURCHASE THE STOCK THEREIN PROVIDED FOR, AND TO RESCIND THE CONTRACT AND TO HAVE TURNED BACK THE STOCK ON WHICH THEY HELD AN OPTION TO PURCHASE, ON OR BEFORE MARCH 4, 1901, OR THEY WERE BOUND TO PAY THE $4,500 SUED FOR.

We think the learned Supreme Court of the Territory, as well as the trial court, fell into error in failing to take a correct view of the contract, which was the basis of the action. The contract was not for a sale and transfer of the stock. It was simply one wherein the parties on the one hand contracted for a right to purchase, and on the other, for the consideration named, agreed to waive the right to sell the stock to other persons until after the expiration of the time named in the contract. This is what is said in effect in such contract:

"The consideration of the delivery under which the above listed stock and other stock as hereinafter described is as follows: * * * * A payment of $500 is to be made in cash upon delivery of the above named property, and additional property in the way of stock hereinafter listed. The $500 is to be considered an option on all said property until the 4th day of March 1901. * * * The $500 above men-

tioned is to be earnest money to be forfeited in case the balance of payment is not paid. * * * *"

It will be observed that the language quoted makes no mention of a sale of the stock. Neither are there any words which imply an intention to purchase at a future date, or any agreement to so purchase. "The $500 is to be considered an option;" and further, "The $500 above mentioned is to be earnest money to be forfeited in case the balance of payment is not made." There is no ambiguity in this language. The parties paid $500 for the privilege of buying the stock within a certain time. There being no sale of the stock, or agreement of sale, it follows that the title to the stock after as well as before March 4, 1901, remained in Nelson, defendant in error.

The petition upon which a right of recovery is claimed is based entirely upon the theory that because appellants failed to notify Nelson of an election not to purchase the stock prior to the expiration of the time named in the contract therefore in contemplation of law a purchase was made. It is not claimed that a return of the stock was demanded before or after the suit was instituted. And there is no denial that on April 1, before this suit was instituted, this stock was sent by express to Nelson at Fort Smith, Ark., and he refused to receive it. (Pp. 66-67.) The case was brought and tried upon the theory that because appellants failed to notify Nelson of their election not to take they bound themselves as purchasers of this stock. The Supreme Court of the Territory, in deciding the case, state that: "The right of the plaintiff below to recover being based upon the theory that the defendants below had failed to turn back to Nelson the property delivered to them, therefore under the contract were bound to pay the remainder of the contract price of $4,500." (See opinion, p. 170.)

It will not be questioned, from a reading of the decision, that the Supreme Court based its decision upon the theory as above stated; and this shows that the court, in dealing with the case, was fundamentally wrong in its construction of the contract. This misconception of the contract is further set forth in the opinion in the following language on page 171:—

"The uncontradicted evidence shows that this contract was for the purchase of certain mining stocks of coal companies operating or to be operated in the Indian Territory. At the time of the contract, the plaintiffs in error, or some of them, owned certain interests in these companies or some of them, and desired to obtain a controlling interest, and in order to do so, contracted to purchase a certain amount of the stock from the defendant in error which would give them control of the property and of the company."

And also on pages 174-175:

"In this case, the contract was for a sale of the mining stock mentioned and described therein. The delivery of the property, together with the payment of $500 completed the contract, and transferred the title to the plaintiffs in error, subject, however, to the right of plaintiffs in error to exercise their option either of paying the remainder of the purchase price, or of rescinding the contract and returning the property. The right to return the property was a condition of the sale. It was a condition subsequent, the performance of which would have rescinded the obligation of plaintiffs in error to pay the purchase price. The performance of the option to return was subject alone to their election. The plaintiff below had no power whatever to prevent or effectuate it. It could only be performed by the voluntary act of the plaintiffs in error. If they failed to perform it, the conditions were discharged, and the promise to pay became absolute. Some affirmative act was necessary on their part in order to complete the recission. That is to say, the contract required them to return the property. The word "return" is very readily understood, and the plaintiffs in error could only be relieved from the obligation to return the property either by some act of the defendant in error or by some condition making it impossible

to comply with the terms of the agreement. Stevens vs. Hertzler, (Ala.) 19 So. 838."

The above quotations contain the two most important paragraphs of the opinion of the Supreme Court of Oklahoma and the only authority cited in support thereof. A careful review of that case and of the earlier case in Alabama therein referred to shows that the authority cited does not support the court's conclusion.

In the Stevens vs. Hertzler case it appears that on January 16, 1894, the plaintiff entered into the following contract with Hertzler and others:

"State of Alabama, Madison County. Know all men by these presents that: Whereas, we, Henry P. Turner, John Hertzler, Jr., James R. Stevens, Jr., William Burritt, and H. & C. L. Toney, a partnership composed of Harris Toney and Charles L. Toney, all of the county and state aforesaid, are desirous of selling our respective and separate holdings of the stock of the Hagey Hospital Association of Texas, a corporation duly organized and incorporated under the laws of the state of Texas; and whereas we each own forty-nine (49) shares of said stock, of the par value of one hundred dollars each: Now, therefore, this instrument witnesseth that for and in consideration of the sum of ten dollars to us in hand paid by James R. Stevens, of the county and state aforesaid,and for divers other and valuable considerations, we do hereby covenant and agree with, and obligate ourselves to, the said James R. Stevens, his heirs and assigns, that we will, at any time within three months from the date of this agreement, sell, transfer, and deliver to the said James R. Stevens our respective shares of the stock in the said Hagey Hospital Association of Texas, a corporation duly organized and incorporated under the laws of the state of Texas, as aforesaid, at and for the agreed sum of twenty-five and 92-100 dollars per share. In the event the said James R. Stevens should not avail himself of the option within the time specified, then these presents are to be void, and all parties hereto are to be discharged from any liability on account thereof. Given under our hands and seals this 8th day of January, 1894. H. P. Turner. (Seal.) Jno. Hertzler, Jr. (Seal.) J. R. Stevens, Jr. (Seal.)

H. & C. L. Toney, for 25 shares. (Seal.) H. & C. L. Toney, for 24 additional shares, if satisfactory to W. F. Baldridge. (Seal.) W. H. Burritt. (Seal.)"

The opinion also shows that on January 16, 1894,

"The plaintiff, under the contract above set out, sold and delivered to the defendant forty-nine shares of the capital stock mentioned in the contract above set out, and thereupon the defendant executed and delivered to the plaintiff an instrument in writing, in words and figures as follows: 'Huntsville, Ala., January 16th, 1894. Received of John Hertzler, Jr., (49) forty-nine shares of the capital stock of the Hagey Hospital Association of Texas, to be paid for as per terms of a contract duly signed by said Hertzler, Jr., dated January the 8th, 1894, or the said 49 shares of stock to be returned by me to said Hertzler within the time specified in said contract. J. R. Stevens. Witness: Erskine Mastin.'"

It also appears that the defendant retained the stock and failed to return it, as he had agreed, and also failed to make payment of the purchase price of the stock. It will be observed at a glance that there are clear distinctions between the contract made by the two instruments in that case and the one at bar, the principal ones being, first: in the contract at bar, there was a mere delivery of the stock with no contract to "sell, transfer and deliver" the stock. Second: that while there was an option in the first agreement of January 8, 1894, as in the case at bar, there was no option in the consummated agreement of January 16, 1894, but the stock was received under the option given the party in the first agreement, and a positive agreement made to pay the purchase price, or return the stock. And, third: there was no provision in that contract, as in the case at bar, fixing the damages, penalty or forfeiture to be paid for failure to elect to pay the balance of the purchase price. The court, in the opinion, say as a basis for their decision:

"The delivery and acceptance of the stock having no other attribute

than an election by the defendant to exercise the option, and performance —by plaintiff—of the agreement, the necessary import of the last agreement is that defendant did exercise the option; and, upon his promise to pay, time for payment, as shown in the agreement."

But there was no such election made by the parties in the case at bar. They never did exercise their option to take, by receiving the stock and making an agreement to pay therefor, as in that case. It is true there was an agreement to pay or return, but concerning it the court there said:

"It is true the promise was to pay or return the stock within the given time. Most obviously, the right to return was a mere condition of a sale."

But in the case at bar there was no sale. There was a mere option, never exercised, to take the stock, and there was also the express agreement that "the $500.00 above mentioned is to be earnest money to be forfeited in case the balance of the payment was not paid." So that the very contract fixed its own penalty for failure to make payment, and that was a forfeiture of the $500 which was paid to Nelson as a consideration for this option. The failure to make payment was by the express terms of the contract equivalent to an election not to take the stock, but instead thereof, to forfeit to Nelson the $500 paid. And in distinguishing that case from the case of Wailes vs. Howison, 93 Ala., 375, the court said:

"Here, the promise to pay was made in consideration of the new and independent act of delivery of the stock to the promisor, subject to be discharged by his affirmative act of returning the stock, within the stipulated time."

Thus showing that the court meant that if the case rested upon the first contract, with no exercise of the option to take the stock, there would

have been no obligation upon the defendant to pay for the stock. The court there expressly say:

"The case is unlike that of Wailes v. Howison, 93 Ala., 375. There the delivery of the options, as they were called, was a part of the option to purchase itself. The provision to pay, or return the options, within thirty days, was considered in connection with other stipulations of the contract, notably, the provision that, 'if the said A. P. Howison, or his assigns shall pay or cause to be paid to the said Wm. E. Wailes the sum of ten thousand dollars, within thirty days, then all the rights which are possessed by said Wailes, by reason of said option, shall accrue to, and said options become the property of said A. P. Howison, and, upon the whole contract, its construction was that, to render it binding upon Howison, he must have made known his election to exercise the option within the designated time, unaffected by the fact that he had possession of the options.'"

Thus showing that the court was not to any extent or in the slightest degree, intending to modify the rule of law as declared in Wailes vs. Howison, and showing also that the fact of possession of the stock by the defendant and the failure to return it, as in the Wailes-Howison case could not be held to be an elcetion to keep, to purchase, and to pay for the stock under the optional contract.

The contract in Wailes vs. Howison was as follows:

"This indenture witnesseth, that for and in consideration of one hundred dollars in hand paid, the receipt of which is hereby acknowledged, Wm. E. Wailes has delivered Allen P. Howison the following mineral right, or options to land, viz., N. C. Blake, A. F. Blake and M. J. Blake, two hundred and twenty acres of land; P. Wallace, D. Wallace and M. P. Wallace, to two hundred and twenty acres; M P. Wallace, eighty acres; John Lowery and Jane E. Lowery, to two hundred and twenty acres; F. S. Lightsey, two hundred acres; said mineral rights all in the county of Bibb and State of Alabama; upon consideration that, if the said A. P. Howison, or his assigns, shall pay or cause to be paid to said Wm. E. Wailes the sum of ten thousand dollars

($10,000), within twenty days, then all the rights which are possessed by said Wailes, by reason of said options, shall accrue to, and said options become the property of said A. P. Howison, or his assigns, the said Wailes in no wise being responsible for warranty of titles, or further payment to former owners or landlords. And the said A. P. Howison hereby obligates himself to pay to Wailes the sum of ten thousand dollars, or to return to said Wailes the within described options, within thirty days from this date. Dated January 31st, 1887."

That contract is practically identical in its purpose in substance with the case at bar, excepting there is no provision in it, as there is in the case at bar, clearly declaring that the failure to pay the amount expressed as the price of the stock should be held an election to forfeit the money advanced and paid for the option. So far as the provision with reference to pay for or return the stock, the two contracts are practically identical. The provision in each is:

Wailes-Howison contract.

"And the said A. P. Howison hereby obligates himself to pay to Wailes the sum of ten thousand dollars, or to return to said Wailes the within described options, within thirty days from this date. Dated January 31st, 1887."

Guss-Nelson contract. (Record page 17.)

"The $500 is to be considered an option on all of said property until the 4th day of March, 1901. At that date the above named parties are to pay to Nelson an additional sum of $4,500.00 (four thousand, five hundred dollars) or in lieu thereof to turn back to said Nelson all the property delivered to him."

The two contracts are thus substantially the same, except in the case at bar, and, as before suggested, there is, in addition, the clear declaration that the failure to pay the price of the stock on the day

turn over 25 per cent of the capital stock of the following coal companies located in the Creek Nation, to-wit: Sapulpa, Choctaw, Catoosa, Wewoka, Red Fork, Neyaka, Concharty, Tulsa, Car Creek and Broken Arrow Mining Companies, to the following persons, U. C. Guss, W. H. Gray, F. H. Greer and J. W. McNeal. The consideration of the delivery under which the above listed stock and other stock as hereinafter described is as follows: This also includes the delivery of the records belonging to each of said above named companies, the seals and other records that in any way belong to any of said companies. A payment of $500 is to be made in cash upon delivery of the above named property, and additonal property in the way of stock hereinafter listed. The $500 is to be considered an option on all said property until the 4th day of March, 1901. At that date the above named parties are to pay to Nelson an additional sum of $4,500.00 (four thousand, five hundred dollars) or in lieu thereof to turn back to said Nelson all the property delivered by him. In addition to the above mentioned 25 per cent of the capital stock aforesaid, which the said J. T. Nelson represents he owns in his own right, he agrees to turn over and deliver enough more stock to make the aggregate sum of stock delivered by him under this contract as follows:

Sapulpa	1210 shares
Choctaw	369 shares
Catoosa	369 shares
Wewoka	369 shares
Red Fork	369 shares
Neyaka	368 shares
Concharty	369 shares
Tulsa	319 shares
Car Creek	369 shares
Broken Arrow	369 shares

The $500.00 above mentioned is to be earnest money to be forfeited in case the balance of payment is not paid. Nelson also agrees to give U. C. Guss his proxy as director in each of the above named companies until such time as it may be convenient for him to resign and Guss or some one else be elected to fill the vacancy.

U. C. GUSS.
W. H. GRAY.
J. W. McNEAL.
F. H. GREER.

J. T. NELSON."

On the 6th day of April, 1901, J. T. Nelson brought suit in the District Court of Logan County, Oklahoma Territory, to recover the $4,500, the alleged balance of purchase price of this mining stock under this contract, with interest from the 4th day of March, 1901. (p. 15.) This suit was brought on the theory that the defendants were indebted to Nelson in the sum of $4,500 as the balance of purchase price for the stock under this contract, and that they were liable therefor because the defendants had failed to return the stock, seals and other corporate records to Nelson on the 4th day of March, 1901. (Petition p. 16; opinion of the Supreme Court of Oklahoma p. 170.)

The defendants demurred to this petition of the plaintiff in the trial court and this demurrer was overruled and exception taken. (p. 18.) Answer was filed by defendants in three paragraphs, first; a general denial; second, alleging the exercise of the option not to take the stock on or before March 1, 1901 and the sending shortly thereafter of this stock to plaintiff at his last-known post office address, Ft. Smith, Ark., and his refusal to receive it; and, third: that the contract was entered into on account of the fraudulent representations of the plaintiff Nelson. The case was tried to the court without a jury (p. 27), and judgment rendered for the plaintiff Nelson on Feb. 19, 1903, in the sum of $4,500, together with interest from March 4, 1901 to date of judgment, amounting to $616.87, making a total judgment of $5,116.87. (p. 163.) This judgment was affirmed by the Supreme Court of Oklahoma on Sept. 2, 1904, and appeal and proceedings in error therefrom lodged in this court Nov. 19, 1904. The judgment of the Supreme Court of Oklahoma shows that the right of plaintiff to recover was based upon the theory that defendants below had failed to turn back to Nelson the property delivered to them, and therefore under the contract, were bound to pay the remainder of the contract price, and that the con-

tract was a conditional sale contract with the right of the defendants to rescind the obligation, and if they failed to rescind it on or before March 4, 1901, the promise to pay became absolute, and under this theory they were held liable for this $4,500 and interest. (Opinion pp. 170-176.)

The evidence in the case is somewhat voluminous, but from it, undisputedly appears that this written contract was made at the Guthrie National Bank in the city of Guthrie, Logan County, Oklahoma Territory. (p. 36.) Nelson at that time resided in Ft. Scott, Kansas, and came from there to Guthrie at that time. (pp. 36-120-121.) At the time of the contract Nelson was secretary of these stock companies. (pp. 121-122.) Nelson delivered the stock mentioned in the contract to these four parties at the Guthrie National Bank, Guthrie, Oklahoma, at the time the contract was made, and resigned the office of secretary, and shortly thereafter sent the seals and other records of these companies to Guthrie, and Mr. U. C. Guss was elected secretary in his stead. The stocks and records and seal were kept at the Guthie National Bank. (pp. 36-40-84.) These four parties had, before that time, become the owners of one-fourth of the stock in each of these ten mining companies (p. 28), and J. W. McNeal was treasurer thereof (p. 29), and subsequent to May 28, 1900, J. W. McNeal as treasurer of these companies received royalties, as the money was called, amounting to $500 by March 4, 1901. (pp. 41-53.) This money was divided by McNeal among these several parties, but without any dividend ever having been declared by the corporation. (pp. 42-53.)

There is not the slightest evidence or claim that these option holders ever decided to or elected to purchase this stock under their option, but on the contrary, it clearly appears that they determined before the 4th of March, 1901, not to exercise the option to take the stock, and

were ready and willing to turn it, and all the seals, books, etc., of these companies back to Nelson. (Evidence of McNeal, p. 57, U. C. Guss p. 76-92, W. H. Gray p. 82, Frank H. Greer p. 84.)

On Feb. 25, 1901, J. T. Nelson wrote J. W. McNeal from Ft. Smith, Arkansas, with reference to this option, (p. 37) and on Feb. 27, 1901, McNeal wrote Nelson in answer thereto (p. 38) a letter which indicated this stock would be returned to Nelson, and just before the 4th of March 1901, it was determined not to take this stock, and John D. DeBois, an attorney for these parties, was directed to notify Mr. Nelson of their election not to take this stock, and that the stock, papers, etc., would be returned to him (pp. 58-75-76), and on March 3, 1901 Mr. DeBois wrote and mailed at the Guthrie, O. T. postoffice a letter to this effect and that the certificates, papers, etc., were at the Guthrie National Bank for him, to Mr. Nelson at Ft. Smith, Arkansas, and the same day sent Mr. Nelson a telegram to the same effect to Ft. Smith, Arkansas (pp. 64-65), from which point Mr. Nelson had been in correspondence with these parties on this matter. This letter was put in an envelope with Mr. DeBois' return card on it, but was never returned. This was apparently not received by Nelson, as he on March 29, 1901, wrote a postal card (p. 66) to John D. DeBois at Guthrie asking "why do you not let me hear from you," referring to this matter, but there is no denial that they were sent. On April 1, 1901, this stock was sent to Mr. Nelson at Ft. Smith, Arkansas, by express. (p. 66.) This Mr. Nelson refused to receive, but on April 6, 1901, began this suit and on April 17, 1901, wrote a letter to Mr. McNeal from Ft. Smith, Ark., to Guthrie, Okla., advising McNeal that he, Nelson, had refused to receive the stock. (p. 67.) The evidence does not disclose the slightest proof of any demand ever having been made by Nelson upon any of these parties Guss, Gray, McNeal or Greer on or after March 4, 1901, for the return of this stock,

selves to purchase it. We think if the territorial courts had kept the distinctions in mind which are properly in the case, no trouble whatever would have resulted. Nelson would have received back his stock and kept the $500, and that would have restored the parties to the position contemplated in the contract upon appellants' failure to elect to take the stock.

Jo. Gordon vs. George W. Swan and H. M. Kollock, 43 Calif., 564, appears a case where the stockholders and owners of a *mine assigned* their stock to some parties in trust, to be turned over to persons who took an option upon the mine and agreed to make certain improvements in the mine within a specified time, and in which the parties undertaking further agreed:

"To pay * * * to the parties of the first part, by paying the same to the said trustees for them, the sum of fifty thousand dollars at the end of six months from the time this agreement is signed and possession of the mine taken;"

and further agreed to make two additional payments of fifty thousand dollars each at intervals of six months. It was then agreed that a forfeiture of money paid, etc., should attend a failure to take the stock, as in the case at bar, the forfeiture clause being as follows:

"If the parties of the second part fail to fulfill any of the agreements herein contained to be by them performed, they shall forfeit whatever improvements they may have made in and about the mine, and all moneys paid in accordance with this agreement, etc."

Further, the opinion of the court, in construing the contract, states:

"We think it is very evident that this amount was to form the consideration for the purchase of the stock, which, if purchased, would, by the action of the Board of Directors, result in a conveyance of the mine to the defendants. It was a device by which the defendants could acquire the title to the mine, and the stockholders could receive their

several proportions of the purchase money directly, and without the trouble and delay of the proceedings for its distribution which the statute would otherwise require.

"It cannot be claimed that it was the true import of the contract that this large sum of money was to be paid for a brief possession of the mine, or for the privilege of erecting furnaces and testing the value of the ore. It was intended as the purchase money of the property itself, and it is substantially as if the contract had been made with the corporation instead of the stock holders.

"The contract contains no obligation on the part of the defendants to purchase the stock. On the contrary, it seems to be clear, from the terms of the instrument, that the purchase should be at defendant's option. * * * * The contract provided for a peaceable possession of the mine by the stockholders in case of defendant's failure to perform, and a forfeiture of all moneys paid or improvements made by them. It was one of a class of contracts common among miners, by which the mine owner gives to another person the privilege of prospecting the mine for a certain time, and the option of purchasing at a fixed price, or perfecting the improvements made by him. The defendants by their failure to pay the first installments of the purchase money, exercised their choice and so lost the privilege of purchase, and forfeited their improvements; but did not become liable for the amount which, by a reasonable construction of the instrument, they were to pay only in the event of their election to consummate the purchase and receive the title to the mine."

The court there concluded that the defendants, by their failure to pay the first installment of the purchase money, exercised their choice and lost the privilege of purchase, and forfeited their improvements, but did not become liable for the amount which by a reasonable construction of the instrument, they were to pay only in the event of their election to consummate the purchase and receive the title to the mine.

How different, indeed, is that conclusion upon a contract similar to the one at bar, for there the Supreme Court of California determined that:

"Their failure to pay * * * * exercised their choice, and so lost the privilege of purchase, * * * *; but did not become liable for the amount,"

of the agreed price of the optional contract. While in the case at bar, the Supreme Court of Oklahoma held:

"If they fail to perform it, the conditions were discharged, and the promise to pay became absolute. Some affirmative act was necessary on their part in order to complete the rescission."

This, we again suggest, is the pith and essence of this case, and the Supreme Court of Oklahoma has misconstrued the meaning and force of such option, or else the Supreme Court of Alabama and the Supreme Court of California have done so, for the holdings of these high courts are exactly opposite in the interpretation of such contracts, and the weight of reason, equally with the unanimity of authority, is against the Oklahoma construction; and with a proper construction of this contract, and one which we present to the court, the plaintiff of course cannot recover; for unless the construction placed upon it by the Supreme Court of Oklahoma is sound, the plaintiff has manifestly no cause of action against the defendants in the trial court, for his cause is based purely upon the proposition that by a failure to notify plaintiff Nelson of an election not to take the stock and to return the stock to him, Nelson, at some other place than that at which it was delivered, on or before the option day, these defendants became liable to pay the amount agreed upon as the balance to be paid if they elected to purchase the stock.

The Supreme Court of Alabama and the Supreme Court of California say that the failure to pay is an exercise of their choice not to take, rather than to take, the stock or mineral rights described in the options, and this, we believe, is the sound interpretation to be given such contracts.

So, too, here we show that the contract itself, providing, as it does, for the option of purchasing at a fixed price the failure upon the part of appellants to exercise their choice simply resulted in a loss to them of the privilege of purchasing, and forfeited the sum of $500, the agreed amount to be paid in case they failed to elect to purchase the stock. But by this they did not in any manner become bound for the payment of the $4,500.

We think under the law the appellants should be considered the bailees of the stock, not the owners, or as having any ownership interest in the property. They had never agreed to become the purchasers, never contracted to do more than forfeit a sum of money. The possession of the property therefore was a mere bailment, to be terminated when their right to purchase expired. Suppose for instance after appellants had failed to purchase the stock, it had become very valuable. Can it be contended that they would still have had the right to purchase the stock subsequent to the expiration of the time named in the contract? Unquestionably Nelson could have refused to sell under such circumstances, and might have brought an action to recover the stock, or its actual value, no matter how great such value may have been. This being true, does it not follow that no sale, either *in praesenti* or contingent, occurred at the time of the execution of the contract, and does it not further follow that if no sale or agreement to sell is in the contract, appellants became the bailee of this stock, and if bailees, surely they may not be charged and held as purchasers.

Sargent vs. Gile, 8 N. H., 325, from the syllabus:

"Where one receives goods upon a contract, by which he is to keep them a certain period, and if in that time he pays for them he is to become the owner, but otherwise he is to pay for the use of them, he receives them as a bailee, and the property of the goods is not changed until the price is paid."

Luddon & Bates Southern Music House vs. Dusenbury, 27 S. C., 464, we find a case where the distinction between bailment and sale is set forth and wherein the court lays down the rule that a contract or instrument under consideration must be the guide in determining whether personal property placed in the possession of other parties is a sale or bailment. From the opinion:

"Looking, then, to the language employed, it would seem that they could not well have used stronger language than was employed to express an intention to make a contract of hiring. The transaction is so characterized in express terms throughout the whole instrument, and there is not a word in it that indicates, in the remotest degree, that the parties contemplated a sale until we come to the last paragraph, and then the language used clearly imports not an intention to make a *present sale* —but simply an intention to give Franks *an option* to buy at some *future* time, if he shall *then* desire to do so."

Streeper vs. Williams, 48 Pa. St., 450, from the syllabus:

"Where a hotel owner agreed to sell it for $14,000, of which $3,000 was to be paid at a specified time, when a deed was to be signed; part possession to be delivered immediately, and in the contract, the parties agreed to forfeit $500 in case either failed to comply with its terms; Held, that the forfeiture was intended by the parties as a compensation to either in case the other wholly abandoned the contract; and that it was liquidated damages and not a penalty."

The contract in this case was not a sale of the stock, but rather for the sale of an option or right to purchase the stock. The fact that the parties agreed in the contract to pay prior to the time named therein an additional sum of $4,500, or in lieu thereof, to turn back the stock, is fully explained in its purpose by the subsequent language, which reads: "The $500.00 above mentioned is to be earnest money to be forfeited in case the balance of payment is not paid."

This latter clause fully explains the intention of the parties at the

time the contract was entered into. The contract is a forfeiture contract, and we think can be construed as nothing else, and it follows, if it be a forfeiture contract, it is to be most strictly construed against Nelson, the beneficiary under such contract. And the contract itself having provided just what should happen in the event of the failure of the parties to elect to purchase the stock, we believe the Supreme Court of the Territory was wrong in holding that Nelson had the right to claim that the parties, at the time they entered into the original contract, had agreed to pay the $4,500 in case they failed to elect within the time named in the contract. Looking at this contract from this standpoint, it will be seen that Nelson, by his action, is doing more than to simply claim the right of forfeiture of the $500. He is undertaking to enforce the sale of the mining stock, a thing which was not agreed upon in the contract. This we claim he may not do.

The evidence in this case shows that the appellants undertook to notify Nelson before the expiration of the contract of their intention not to purchase, and the evidence further shows that very shortly after the expiration of the time named in the contract, they forwarded the stock to Mr. Nelson, and he refused to accept the same, thus showing that the appellants were not seeking an unfair advantage under their contract.

II.

APPELLANTS HERE, DEFENDANTS IN THE TRIAL COURT, WERE NOT REQUIRED, UNDER THE CONTRACT, TO DELIVER OR TENDER BACK THE STOCK, SEALS AND RECORDS TO THE PLAINTIFF, J. T. NELSON, AT FT. SMITH, ARKANSAS, OR ANY OTHER PLACE THAN GUTHRIE, OKLA.,

ON MARCH 4, 1901, WHERE THEY WERE READY THEN, AND EVER SINCE HAVE BEEN, TO DELIVER THESE ARTICLES TO PLAINTIFF NELSON.

If the court should construe this contract to be other than a mere option on the part of the defendants to purchase this stock on the 4th of March, 1901, then we contend that they have complied with its terms. There is no question but that they have been ready and willing ever since the 3rd day of March, 1901, to turn back the stock and paraphernalia received from Nelson to Nelson. They determined by that day not to purchase this stock and not to pay the $4,500 provided for in the contract, but to return the stock, etc., to Nelson. This is the clear proof in the case and is absolutely undenied, but the court took the theory that they were bound to return the stock, seals, etc., to Nelson at Fort Smith, Ark., or wherever he might happen to be that day, and if they did not do so, they were bound to pay the $4,500. This, we contend, is not the law. The contract did not stipulate where they were to turn back to Nelson the property delivered by him. Nelson delivered the stock, the seals and the records to the defendants at Guthrie, Okla. Nelson delivered nothing whatever under this contract to these defendants at any other point, and we contend they were entitled to deliver back this property back to Nelson, when delivery was required, at the place where they received it. Nelson was not a resident of the territory of Oklahoma. He was, or at least had been, at Fort Smith, Ark. He had written Mr. McNeal from that point on February 25, 1901, and requested that the stock, etc., be sent to him by freight. (Page 37.) His various other communications were from the same point. (Pages 65-66-67.)

On March 3, 1901, J. D. DeBois, who was acting for the defendants,

wrote a letter and sent a telegram addressed to Mr. Nelson at Fort Smith, Ark., advising him that the certificates of stock, etc., which he had turned over to the defendants, were at the Guthrie National Bank for him, and that the parties would not pay the $4,500. The sending of this letter through the postoffice in due course, and this telegram to Mr. Nelson, both at Fort Smith, Ark., is not disputed. The parties had had correspondence with Mr. Nelson immediately before this at Fort Smith, Ark., and certainly had good reasons to suppose that he was there at that time. Such notice, therefore, sent to him within the time required by the contract, was all that defendants should be held bound to do in order to give notice of their election not to purchase the stock. They were not bound to go away from the place of the contract and go out of the Territory and personally hunt up Mr. Nelson to either give him notice of their election not to take the stock, if any notice at all were required, and to tender the stock and corporate paraphernalia to him in person.

The general rule of law applicable to a case where one is bound to make payment is a very old one and laid down by Littleton, Section 304, (2 Coke upon Littleton, 55) as follows:

"If no place of payment of money be specified, the party is bound to seek the person to whom it is due, if within the realm; but if he be out of the realm, this dispenses with the tender and no rights are lost by the inability to make it."

In commenting upon this rule, the Supreme Court of New York, speaking by Nelson, Chief Justice, says:

"The true meaning of the text and commentary, I apprehend, applies to the case where the party to whom the money is to be paid has no residence in the kingdom. If he has a residence, it would be agreeable to the understanding of the parties to the contract that the tender should be made there, as it is but reasonable to presume some compe-

named is to be attended with a forfeiture of the $500 then paid. No terms could have made the contract more clearly one of a pure option with a forfeiture of the money advanced, upon the failure to elect to take; and the penalty for failure to exercise the option to take was not, as the Supreme Court of Oklahoma say, that the defendants should be held for the payment of the $4,500, but simply should be held for a return of the stock—a thing never demanded by Nelson, and always ready to be performed by the defendants.

The Supreme Court of Alabama, in the Wailes vs. Howison case, in construing the contract set forth therein, has shown why an action for the recovery of the sum agreed upon will not lie in case the parties having the right fail to make the election within the time agreed upon. The reasoning of the court appears to us to be without fault. In the opinion, after setting forth the contract, it is said:

"The contract, the foundation of the suit, being in writing, its construction is a matter of law for the court. * * * It is insisted by appellant that the contract is one of 'sale or return.' The bargain called 'sale or return' has been defined to be a 'sale with a right on the part of the buyer to return the goods at his option within a specified time, or, when no time is specified, within a reasonable time.' Moss vs. Sweet, 16 Q. B., 493; Benjamin on Sales, 442. To make a bargain of "sale or return," it is indispensable that there be a sale. As a general proposition, in order to constitute a sale, there must be a delivery of the thing sold, with the intention of passing the "title," and it is contended that the indorsement of the options at the time of their delivery were intended to and did pass the legal title to the transferee, and constituted a bargain of 'sale or return,' leaving in the grantor the option to return within thirty days.

"Mr. Story lays down the rule, that, in all cases where credit is not given, or where the delivery is not intended by the parties to be abso-

lute, a mere parting with the goods will not of itself constitute an absolute delivery." Story on Con., sec. 804. The written indorsements of the options, without condition, passed the title; and if the transferee, with the evidence of ownership and title in his possession had sold the option to third innocent parties for a valuable consideration, no doubt the purchasers would be fully protected; but the principles of law applying for the protection of innocent third persons can not be invoked by a grantee against his grantor. As between the grantee and grantor, their respective rights depend upon contract between them, and the contract must be so construed as to effectuate the intention.

"Construing the contract as between parties themselves, do the indorsements, when construed with the agreement, show a sale and delivery of the mineral right and options for ten thousand dollars, which the purchaser had the option to annul, or rescind upon condition subsequent, by a "return," or do they show that the payment of the ten thousand dollars was a condition precedent to a sale, and that the transfer was the agreed price of the mineral rights, and the sale was concluded at that price, the question arises, for what consideration was the one hundred dollars in cash paid? If the parties intended the transaction to be a bargain of sale, by which the title passed, what force and effect is to be given to the following provision of the contract: "For and in consideration of one hundred dollars in hand paid, Wm. E. Wailes has delivered the following mineral rights or options to land, viz, * * * upon the condition that , if the said A. P. Howison, or his assigns, shall pay or cause to be paid to the said Wm. E. Wailes the sum of ten thousand dollars, within thirty days, *then* all the rights which are possessed by said Wailes, by reason of said option, shall accrue to, and said options *become* the property of A. P. Howison. There can be no doubt that this provision of the contract makes the payment of the ten thousand dollars a condition precedent, and as between the parties a sale of the mineral right and options was not intended, until its payment; for it is expressly provided that "then" upon the payment of $10,000) the mineral rights *shall become* the property of Howison."

"The payment of one hundred dollars was a sufficient consideration to uphold the purchase of the option for twenty days, and during that

time Wailes could revoke or rescind the offer of sale. During the twenty days it was optional with Howison, either to purchase the mineral rights by paying the ten thousand dollars, or decline the purchase. He had paid one hundred dollars for this privilege. A mere failure alone to pay within twenty days terminated his optional rights, and Wailes then could have compelled him to deliver up the option contract. It did not require a 'return' to invest the right in Wailes. * * * *

"The contract nowhere uses the word *sale*, or any term or statement of facts equivalent to a sale. * * * * It is clear the parties did not intend by the transaction that the title to the mineral rights and options should pass so as to make it a sale, except upon the payment of the ten thousand dollars as a condition precedent; and which understanding and intention would prevent the transaction from being a bargain of 'sale or return.' The obligation to pay ten thousand dollars, or return the options within thirty days, did not extend the time within which Howison had the option to purchase. The agreement had definitely fixed this time at twenty days, and there is no provision for an extension of the twenty days to thirty days.. * * * *"

"The contract cannot be construed as extending the offer to sell for thirty days, or that the transfer and delivery of the mineral rights and options was intended to operate as a sale without the payment of ten thousand dollars as a condition precedent, or that the transaction was a bargain of 'sale or return' without overthrowing and disregarding the clearly expressed meaning and words of the agreement.

"Looking at the entire contract, we are satisfied that the parties never intended, and the contract is not, an absolute promise to pay ten thousand dollars as a bargain of 'sale or return,' or as liquidated damages for failing to return the options within thirty days."

Not only then, it seems to us, is the authority which the Supreme Court of Oklahoma gives as the one support for its decision not against us, but its reasoning is actually in our support; and that authority also cites the Wailes-Howison case which we have now reviewed, and which clearly and fully supports our claim with reference to the interpretation of this contract.

The contract under consideration and interpretation in Wailes vs. Howison was exactly like the contract in the case at bar in all the essential particulars of the Alabama contract, and these likenesses appear in the following particulars:

First. Each contract fixed a stipulated price at which the mineral right in the one case and the stock in the other, could be purchased.

Second. A sum was paid down at the time of making the contract which, in the Alabama case, was construed to be the price of the option, and in the Oklahoma case is declared to be forfeited if the option is not exercised by payment of the stock.

Third. The contract is an optional one, giving to the party an option to purchase or not by a stipulated time.

Fourth. The optional contract relates to mineral rights in land in the one case and to stock whose only value lies in mineral leases in the other.

Fifth. There was an actual delivery over of the mineral right in the one case, of the stock in the other with the option, at the option of the contemplated purchaser.

Sixth. There was a contract in each case to pay the agreed amount by a stipulated day, or to return the mineral right or option in one case or the stock in the other.

These points of identity in the contracts covering all the essential features of them, a decision in one case should in the absence of no safer authority (and none has been cited in this case), be controlling in the other. The Supreme Court of Oklahoma has not undertaken in its decision to say that the decision in Wailes vs. Howison is not good authority for this case. It has simply misconstrued this optional contract,

and declared it to be a contract of conditional sale, which the authorities show clearly it is not, and then declared that we have failed to exercise the condition under which we could rescind the sale, when there was no sale made, and no contract which required recission, in order to prevent a binding obligation upon the holder of the option, but rather a contract which required an affirmative exercise of an option to take in order that the option holder might be transformed into a purchaser of this stock. In our judgment, this case of Wailes vs. Howison is conclusive upon this case.

The evidence could not, of course, vary the terms of the contract, as the contract is plain in its terms, and no testimony was offered for the purpose of attempting to change any of its provisions, and therefore we presume the court meant to, or should have stated only its conclusions as drawn from an inspection of the contract itself. It is very evident, therefore, that the Supreme Court of the Territory, in construing the contract, had in mind the idea that the sale of the stock was agreed upon in the contract as there must have been an agreement which would bind as purchasers in order to warrant the judgment.

In order to present clearly the distinction we have in mind, we suggest that in dealing with sales or transfers of property of the character under consideration, there may be, first: a sale of the stock; second: an agreement to sell; and third: what is generally termed an option by which, for a consideration, one party agrees that another may at some future date purchase. This distinction is very clearly set forth in Ide vs. Leiser, 24 Pac. (Mont.,) 695, as follows:

"The first is the actual transfer of title from grantor to grantee by appropriate instrument of conveyance. The second is a contract to be performed in the future, and if fulfilled results in a sale. It is a preliminary to a sale, and is not the sale. Breaches, rescissions or release

may occur by which the contemplated sale never takes place. The third, an option, originally is neither a sale nor an agreement to sell. It is simply a contract by which the owner of property (real estate being the species we are now discussing) agrees with another person that he shall have the right to buy his property, at a fixed price, within a time certain. He does not sell his land, he does not then agree to sell; but he does then sell something, viz., the right or privilege to buy at the election or option of the other party. The second party gets, *in praesenti*, not lands, or an agreement that he shall have lands, but he does get something of value; that is, the right to call for and receive lands, if he elects. The owner parts with his right to sell his lands, except to the second party, for a limited period. The second party receives this right, or rather, from his point of view, he receives the right to elect to buy. That which the second party receives is of value, and in times of rapid inflations of prices, perhaps of great value. A contract must be supported by a consideration whether it be the actual sale of lands, an agreement to sell lands, or the actual sale of the right to demand the conveyance of lands. A present conveyance of lands is an executed contract. An agreement to sell is an executory contract. The sale of an option is an executed contract; that is to say, the lands are not sold; the contract is not executed as to them; but the option is as completely sold and transferred *in praesenti* as a piece of personal property instantly delivered on payment of the price. * * * * " (Citing numerous authorities.)

Applying the principle therein stated: When the contract in this case was entered into, there was an executed contract. The stock was not sold, because such was not the agreement, but the option to sell was purchased. After March 4, 1901, Nelson owned the stock as absolutely as if the option contract had never been executed. He could have demanded the stock and recovered possession thereof. Upon failure, after demand, to turn the stock back, he could have maintained an action for conversion, and if the appellants had disposed of the stock, he could have recovered a judgment for its value. The stock was his; it had never been sold, and appellants did not in any manner bind them-

The court can readily see that the reasons which dispense with the necessity of a tender of money out of the state are more forcible in the case of property. Suppose it were a heavy iron safe which was to be delivered and suppose that the promisee were in Greenland or in the heart of Africa. There being no place named in the contract where the property was to be delivered, would it be contended that the promisor must carry the safe to Greenland or Africa for the purpose of tendering it to the promisee? In such a case it would be practically impossible, and in any event the expense of making a tender of this kind would be many times greater than the value of the property. Of course it would not be so difficult to make a tender in an adjacent state, but in this class of cases it is necessary to have a rule and the law has made the rule to be as stated above. There are many cases in which a rule of law does not apply with absolute perfection to every case that can arise, but as the courts have often said, it is better to have a rule which is plain and easy of application even though it may not in all cases work ideal justice, than it is to have a more ideal rule which it is difficult or impossible to apply. Judge Story said: "The law aims at practical good rather than theoretical perfection." If the rule be fixed that parties are not obliged to go out of the state to make a tender, the rule is plain and easily understood and parties can accommodate themselves to it, and if it be desired that a delivery or payment be made at some point out of the state this can be provided for in the contract. The difficulty of a rule under which it might be conceded that a person need not be followed into the wilds of Africa but which required that the party should be followed to some reasonable distance, would be that there would be no way of determining what would be considered a reasonable distance. In other words, you could not draw the line. In one case, the court might hold that it would be reasonable to make

a tender to a person at a certain point, and in another case of the same character, another court might hold that it would be unreasonable. The rule would thus be so uncertain that it would be the same as no rule at all. No one would be able to tell what the law was. The decisions of the courts would become mere guess work. It is laid down as a maxim that it is of the utmost importance that the laws be fixed, definite and certain, so that parties can advise themselves thereof and govern themselves accordingly. Another consideration which we may suggest is this: It is a general rule that the laws of a state have no extra territorial effect, and it is only reasonable to demand that if a party should avail himself of a law, he should bring himself within the operation of the law. That is, if he would have the law operate in his favor, he ought also to bring himself under the operation of the law. He ought not to put himself in a position where the law cannot reach him and at the same time demand that the law operate in his favor. The law has never shown a disposition to favor persons who keep out of reach. If a person desires any relief at the hands of a court it is required that he come in and subject himself to the jurisdiction of the court.

We have suggested that both reason and authority support the rule suggested above. We have cited authorities and also discussed the reason of the thing and we submit that the rule stated is plainly supported by both reason and the authorities.

We may now mention a case from the Supreme Court of Maine which suggests a slight modification of the rule. We have no hesitation in citing this decision for two reasons. In the first place, so far as the modification is concerned, the entire weight of authority and reason is against it; and in the second place, it happens in this case that we are

within the modification suggested. It was held in this case that "A person is not obliged to follow another out of a state to make a tender; a reasonable effort to ascertain his residence and give him notice is sufficient." Howard vs. Minot, 20 Me. 330.

The latter part of this holding is opposed to the general, or rather, the entire current of authority. Just why a person should make a "reasonable effort" to do a thing when he is not required to do the thing itself is not very apparent. The rule laid down by the other authorities that the place where a contract is made is presumed to be the place of performance, no other place being specified, is much more reasonable. If a contract is to be performed at a certain place the party entitled to the performance ought to be there so that performance can be had. It is impossible to turn property over to a person at a particular place if he is not there to receive it. It is a rule that the law does not require a vain thing, also, that the law does not require an impossible thing, and in a case where a thing cannot possibly be done on account of the absence of a party, it seems unreasonable to require the other party to do anything more than to be ready and willing to do his part. There can be no question whatever that where no place is fixed for the performance of a contract the law presumes that it is the place where the contract is made. In this case the place would be Guthrie. If we analyze the proposition it simply comes to this: A contract is to be performed in Guthrie. Two parties must be present in order that the contract may be performed, first the party who is to make the performance, second, the party to whom the performance is to be made. If the latter is not present, either in person or by an agent, performance is impossible. If the other party is present, ready and willing to perform, that is sufficient. It is not his fault that the other party is not present. It is the duty of the other party to be present. If money is

to be paid or property delivered and the party who is to make the payment or delivery, is present, with the money or property, this is enough. If a contract is to be performed in Guthrie (and that is the effect of the decisions as applied to this case) why should the promisor be obliged to go outside of Guthrie to make performance? This would be to require him to do something which is not provided in the contract. It will thus be seen that if we reason the rule out, it is found narrower in its scope than as stated above. It seems to us that if this were an original question, the hard logic of the case would require a rule such as we have just indicated. But whatever the rule from a strictly logical standpoint may be, and however far a person must travel to tender performance in a state, it is certain, under the authorities, that he need not go out of the state, and this is sufficient for our purpose. We have made these latter suggestions with a view of showing that the modification of the rule suggested by the Supreme Court of Maine is not sound. But even if it be conceded that the modification is sound, it is our contention that we are within the modification.

III.

TIME OF TURNING BACK TO NELSON OF THE STOCK, CERTIFICATES AND STOCK PARAPHERNALIA RECEIVED BY DEFENDANTS WAS NOT OF THE ESSENCE OF THIS CONTRACT, AND SUBSTANTIAL COMPLIANCE WAS MADE, AND IS ALL THAT WAS REQUIRED.

Section 850 (p. 219) of the Statutes of Oklahoma of 1893, provides:

"Time is never considered as of the essence of a contract unless by its terms expressly so provided."

There is nothing in this contract which provides that the particular day, March 4, 1901, was made of the essence of this contract, so far at least as the time of turning back the stock to Nelson was concerned. That date was probably the last date on which the defendants had to elect to take the stock, and their failure to elect to take the stock on that day was equivalent to a determination not to purchase it, and thereby under the terms of the contract, they forfeited the $500 which they had paid, and thereafter they could neither get back the $500 nor acquire the stock by their election to purchase, without the consent of Nelson. They had that entire day in which to make their election to take or not to take the stock, but there is nothing in the contract which indicated that the turning back of the stock certificates and the paraphernalia delivered with it on that very day was of any particular importance. There is not a single scintilla of evidence in the record which shows that the failure of the defendants to send the stock by freight or otherwise to Mr. Nelson at Ft. Smith, Ark., until April 1, 1901, entailed any damage to Nelson, or that the stock in the meantime had become depreciated.

It clearly appears from the evidence that the leases upon these mining lands in the Indian Territory were absolutely invalid, and that the Indian Agent had given notice to the parties interested that if they attempted to mine any coal upon any of these leases, except perhaps upon the Tulsa lease, that they would be arrested, (p. 76), and it would appear that the mining of the coal on the Tulsa lease, or rather, upon a very small portion of it, was done by sufferance. There is, therefore, nothing to show that Nelson was in any way prejudiced by the fact that the stock was not shipped to him until the 1st of April, 1901, or that he was in any way prejudiced by the delay in the defendants' delivery of the same to him by their shipment at that time, if they were

in fact required, which we contend they were not, to deliver this stock or the paraphernalia therewith at any place other than Guthrie, Okla. There was, however, in any event, a substantial compliance with any obligation which this contract can be construed to have made upon them to return the stock and property received under the contract to Nelson.

In the Kansas case, supra, the court referred to the elementary rule that the law only requires a substantial compliance with a contract and held that where a lessor was out of the state at the time that rent should be paid to him, a tender of the rent when he returned to the state was sufficient and was a substantial compliance with the contract. In the present case the defendants really went out of the way to perform. They held the property here ready for delivery if the planitiff should appear. He did not appear. This ,under the authorities was all that they were required to do. But to show their good faith, a little after March 4th, they forwarded the property to the plaintiff at Ft. Smith, Ark., and he refused to accept it (record pp. 67-135). They were not obliged to do this, but if there was any obligation at all in the premises we think this would be, like the tender of rent in the Kansas case, a substantial compliance with the contract. They waited until the time expired to deliver the property here. The plaintiff not appearing to receive it as he ought to have done, they sent it to him and he refused to accept it. He made it impossible to perform the contract in Guthrie where it should have been performed, and declined performance anywhere else. It seems to us that plaintiff should not now be heard to complain.

Furthermore, Mr. Nelson himself did not insist upon March 4, 1901 as being the only time at which the stock, books and seals therewith should be delivered back to him. On March 29, 1901, he wrote to Mr. John

D. DeBois, who was representing the defendants, a postal card from Ft. Smith, Ark., saying: "Wire me if you are not going to be here on the first. Signed, J. T. Nelson." And he explained his meaning in writing this card on page 133 as follows:

"Q. Now then, this card here, dated April 1st, I will ask you what you meant by this "

"A. I meant I wanted you to wire me if you did not want to take the stock."

So that it would appear that Nelson himself was not insisting at the time that March 4th was the day, and the only day, upon which this stock could be returned, or upon which he would receive it, but that even as late as March 29th he was willing for the parties to exercise the option to take this stock, and was willing for them to return the stock if they elected not to take it. They had already made this election and had written and telegraphed him to that effect, and if he did not get the letter or the telegram, he was advised shortly thereafter that the stock had been sent to him, and on April 17, 1901, he wrote to J. W. McNeal, one of the parties, the following letter:

"Office of J. E. Marshall, Real Estate and Loan Agent,

"No. 8, N. Seventh St.

"Ft. Smith, Ark., April 17th, 1901.

"J. W. McNeal, Esq., Guthrie, Okla.

"Dear Sir: I received word today that you had sent the stock. The same will remain in the office subject to your order as I will not accept it.

"Yours truly,

"J. T. NELSON."

So that in any event Mr. Nelson had this stock where he could have received it at his own place of abode, and where he declined to receive it shortly after the 4th of March, 1901.

As to the question whether the seal and books of the corporation were tendered back to Nelson, we think that was of little, if any, importance. Nelson had resigned his position as secretary of the corporation, and there is no evidence that he was, after March 4, 1901, and prior to April 17, 1901, re-elected to this position; and if he had not been re-elected, it would not have been appropriate to have delivered these articles to him. Mr. U. C. Guss had been elected secretary, and was then secretary of the corporation, and under the law he was the proper custodian of these records until some other person was elected secretary. Had Mr. Nelson received back the certificates of stock when sent to him at Ft. Smith, and become qualified to receive the position of secretary of the corporation, and made demand upon Mr. Guss for the seal of the corporation and these books, and Mr. Guss had refused, none of which is shown in this case, there might be some question as to whether, in this respect, the defendant Guss, or in fact any of the defendants, had declined in good faith to deliver back any of the articles received from Mr. Nelson; but in the absence of such a showing by Nelson, and there is no pretense of any such facts being presented in this case, the failure to turn back or to tender back these books, records and seal of the corporation must have little bearing upon this case.

IV.

THE RETENTION OF ROYALTY.

The retention of the royalty by the defendant McNeal as treasurer of these corporations is immaterial here. The Supreme Court of Oklahoma, in its opinion, expressly declined to determine as to whether or not it was the duty of these defendants, plaintiffs in error there, to return the income from the royalty from the Tulsa mine. It does not

tent person has been left to transact the business. * * * It would be a most inconvenient and even impracticable rule, besides liable to great abuse by the party to whom the money is due, to exact in all cases where no place is mentioned, a tender personally."

Smith vs. Smith, 25 Wend. 405

In Allhouse vs. Ramsey, 6 Whart. (Pa.) 331, the court say:

"Where the place of payment is not designated, the money must be tendered wherever the creditor is found within the realm; but the debtor is not bound to go out of it to seek him. Coke, Littleton, 210 b. The rule of the civil law is narrower still, it being said that payment must be made at the *place where the contract was made, unless it appear by express provision or necessary inference, that another place was intended.* 3 Burges Confl. 882. As then, there was no stipulation about place in this instance, the debtor was not bound to follow his creditor to Pennsylvania, which as regards transactions of this nature, stands in the relation to other states as a foreign country, a principle decided in Buckner vs. Finley, 2 Peters, 587."

In Hale vs. Patton, 60 New York, 236, the court says:

"In general, a debtor who is indebted on a money obligation, is bound, if no place of payment is specified in the contract, to seek the creditor and make payment to him personally. But this rule is subject to the exception that if the creditor is out of the state when the payment is to be made, the debtor is not obliged to follow him, but *readiness* to pay within the state in that case will be as effectual as actual payment to save a forfeiture."

The same rule was announced by the Supreme Court of Minnesota. "The rule at common law was that if no place was appointed for the payment of money, if the person to whom the money was due was out of England, the debtor was not obliged to go out of the realm to make him a tender." Bacon's Abdgt., Tender, C. "Under the manifest good sense of this rule, the plaintiff was under no obligation to make a tender to the defendant in North Carolina." Hill vs. Bradley, 21 Minn., 20.

In Tasker vs. Bartlett, 5 Cushing 359, the Supreme Court of Massachusetts held:

"Where the condition of a bond was that if the obligee within one year from date of the bond, should elect to reconvey to the obligor an estate, which the obligor had previously conveyed to the obligee and should give the obligor notice, in writing, of such election, then the obligor, within sixty days thereafter, should pay to the obligee a certain sum of money and deliver up to him certain promissory notes, on tender by him of such conveyance; and the obligee, within the time specified, having made his election to reconvey and given the obligor notice, in writing, went to the house of the obligor with a deed of conveyance, duly executed, but did not tender the same in consequence of being informed by the wife of the obligor that he was out of the commonwealth, and such obligor was then, in fact, out of the commonwealth; it was held that such absence of the obligor was sufficient to excuse the obligee from any further effort of performance on his part; that he was not bound to make inquiry whether the obligor had authorized an agent to act for him in his absence and that it was the duty of the obligor to appoint an agent to act for him in his absence and perform the condition on his part, and to give notice thereof to the obligee."

In the opinion, the Court, after stating the general rule, say:

"We think, also, that he was bound to give notice to the plaintiff of the appointment of an agent; upon the well founded principle that where one party has knowledge of a material fact not known to the other party, he is bound to give notice of it. The plaintiff, therefore, was not bound to make inquiry of anyone whether the principal defendant had authorized an agent to act for him in his absence."

In Jones vs. Perkins, 20 Miss. 139, (64 Am. D. 136) the Court held:

"The presumption of law is that a contract is to be performed at the place where it is made if no place of performance be specified."

In the opinion the Court say:

"The note in this case was made at Jackson, Miss., and the pre-

sumption of law is that it was to be paid there, as no other place of payment is named. The debtor, according to the authorities, was not obliged to go out of the state to make payment."

The early case of Wilmouth vs. Patton, 5 Ky. 280, contains as good a discussion of the rule as we have seen. The rule appears to be so well settled that most of the authorities simply state it and pass on. The court refers to an earlier case in which the rule had been declared, and says:

"The principle established in the case of Chambers vs. Winn, is thought strictly applicable to this case, and independent of the influence of that case as a precedent established, the decision itself appears to be founded on good reason, consonant to justice and intrinsicly correct."

The Supreme Court of Kansas has adopted the same rule. The action involved a lease in which it was provided that if the rent were not paid at the time stated, the lease should be forfeited. The lease named no place of payment and the lessor resided out of the state. The court said:

"The lease is silent as to the place where the rent should be paid as it became due. It must be presumed then that the parties intended that it should be paid at the place or at least in the state where the leased property was situated. The tenant could not be expected to go out of the state to hunt up the lessor and tender the rent. This would be asking too much of him, in fact requiring him to attend to that which should be the care of the lessors.

"We think that the case most clearly shows that it was the fault of the plaintiffs that the rent was not paid nor offered to be paid until four or five days after it fell due and that the defendant did pay the rent or offered to pay it on the first opportunity (as soon as the lessor arrived in the state). A substantial compliance with the terms of an agreement, or performance of a condition, is sufficient and when non-performance of a condition by one party is ocasioned by the act of the other party, it may be excused."

Burns vs. McCubbin, 3 Kas. 215.

21

This case is on all fours with the cases from New York and Massachusetts supra. The Massachusetts court held that if the promisee were not in the state and had left no agent to represent him that the promisor was not obliged to make any inquiry; and that if an agent had been appointed, the promisee should have given notice of it. And the court held that as the defendant was out of the state, and had left no agent to represent him, or, at least, had not notified plaintiff of the appointment of any agent, that this, in effect, prevented a tender, and that in such a case, a willingness to perform was equivalent to a tender. In many of the cases the promisee has evaded tender by designedly keeping away (see cases cited in 5 Cush. 363) but the Massachusetts court held that it was immaterial what the intention was if the promisee was not present; the effect was the same; a tender would be excused; willingness to perform was equivalent to an offer to perform and there could be no forfeiture in such a case.

The New York case is precisely in point. After stating the usual rule, the court say:

"But the performance of a condition of a bond or other obligation is excused by the default of the obligee, or his absence, when his presence is necessary for the performance, or when by his act of omission it can be said that he prevented a performance."

The court will note that the authorities make no distinction between cases where a party designedly or fraudulently absents himself and cases where he is absent without any special design. If a contract involving a delivery or tender is to be performed at a place it cannot be performed unless both parties are present in person or by proxy. If one party is not present he thereby prevents performance, and he ought not to be heard to complain because something was not done which would have been done had he been present. The general rule is stated by Mr. Schouler as follows:

"The general maxim which courts apply to conditional contracts is that one party who would hold the other bound, must show that he has fully performed to the letter every condition precedent which the contract by its terms puts upon himself, save only so far as the other party had waived or prevented performance of such condition."

Speaking of this exception, Mr. Schouler says: "As to the exception above mentioned, which grows out of the opposite party's own acts or conduct, it is clear that an obstruction of performance which renders one's act of performance impossible, puts the obstructing party at fault and renders him liable for the consequences. Hence as it is tersely stated the performance of a condition precedent by the plaintiff which had been rendered impossible by the defendant's *neglect or default* is equal to performance."

2 Schouler Per. Pr. 281-282.

Where a contract is to be performed at a particular place, as a delivery of property, we do not think the promisor would be justified in sending the property away to some other place. He ought to keep it at the place of performance so that if the other party appears he can perform. He might by this means disable himself to perform and might put himself in default. The other party might appear to receive the property and he might have legal cause to complain if the property were not there ready to be turned over to him.

There is no injustice in the presumption that a contract is to be performed at the place where it was made. If some other place be preferred it is an easy matter to so provide. It is a much more natural inference that property is to be turned over where it is than that it is to be carried somewhere, and in actual practice, it is almost always the case that property is delivered at the place where it is. While the language employed in the following extract from Schouler's Personal Property is not in all respects applicable to the facts in the present case, we think the principle involved is clearly implied.

"As to the place of delivery the law presumes a delivery of chattels to have been intended at the place where they were when the bargain was completed; and the seller should be ready to perform accordingly. To quote Chancellor Kent: 'If no place be designated by the contract the general rule is that the articles sold are to be delivered at the place where they are at the time of sale. The store of the merchant, the shop of the manufacturer or mechanic, or the farm or granary of the farmer at which the commodities sold or deposited are kept must be the place where the payment or delivery is to be made, when the contract is to pay upon demand, and is silent as to the place.' Such being the state of things, it is not encumbent upon the seller to take the goods from place to place in search of the buyer; nor indeed would it be prudent thus to expose the property to hazard and increased expense. * * * Sometimes the seller holds himself ready *by the express term of the contract* to send the chattels to the buyer's address; and if this appears to be designated the seller must be ready to make appropriate delivery; but if the buyer fail to designate the place at which he desires delivery made, as he ought in any contract of this kind, the seller performs his duty so as not to be liable for breach by having things ready on his own premises awaiting information."

1 Schouler Per. Pr. 385.

Mutatis Mutandis this language applies exactly to the facts in the case at bar.

In the cases cited above it was money that was to be tendered, but this fact was merely incidental. It was the law of tender that was under consideration. It is not material what the thing is that is to be tendered excepting that if there is any difference, there would be less obligation to tender property out of the state than money.

In Patterson vs. Jones, 13 Ark., 69, it was property that was to be tendered and the court announced the same rule as is above stated.

"Where no place of delivery is named in the contract, the law fixes it at the residence of the party who is to make the delivery."

Patterson vs. Jones, 13 Ark. 69.

FILE COPY.

Office Supreme Court U. S.
FILED
FEB 18 1905
JAMES H. McKENNEY,
Clerk.

In The

SUPREME COURT

of the

UNITED STATES

OCTOBER TERM, 1904.

U. C. GUSS, J. W. McNEAL, W. H GRAY, AND FRANK H. GREER,
Appellants.

vs.

J. T. NELSON,
Appellee.

No. ~~184~~ 124.

BRIEF OF APPELLEE.

ON MOTION FOR CERTIORARI.

W. P. DILLARD,
OF COUNSEL

W. R. BIDDLE,
GEO. S. GREEN,
ATTORNEYS FOR APPELLEE.

The Monitor Binding & Printing Co., Fort Scott, Kas.

In The

SUPREME COURT

of the

UNITED STATES

U. C. GUSS, J. W. McNEAL, W. H GRAY, AND FRANK H. GREER, *Appellants.*

vs.

J. T. NELSON, *Appellee,*

No.....

BRIEF OF APPELLEE.

The appellants by their motion for certiorari and diminution of the record present a question of importance to this court. That question briefly stated is: Should the Supreme Court require the Supreme Court of Oklahoma Territory to prepare from the records and case-made a statement of facts in the nature of a special verdict and certify the same as a part of the record?

There is no claim that the trial court was ever requested to make a statement of facts or conclusions of law as might have been done under the laws of the Territory. There is no claim that the appellants ever requested the

Supreme Court of Oklahoma to prepare such statement previous to taking the appeal to this court. There is no claim that they sought to have such statement made and made a part ot the records of the Supreme Court of Oklahoma so as to be certified with the balance of the record to this court.

Now the facts are that the Supreme Court of the Territory of Oklahoma by its order made on the 11th day of January, 1905, refused to make such statement. (Page 38 of Motion). And in such refusal stated their reason which was: "That the opinion rendered in this case sufficiently states the facts therein."

This perhaps was not the only reason for this refusal because there are other matters that the Supreme Court of the Territory may have considered upon the application. Some of these are, that it is almost impossible for an appellate court to make a statement of facts from a printed record. Appellate courts follow the findings of the trial court unless such findings are not supported by the evidence. Appellate courts never weigh evidence where there is a conflict. They take the findings of the trial court as conclusive unless such findings are not supported by the evidence.

This is the rule in all law cases. The trial Judge sees the witnesses, hears their testimony, notes their conduct and can inform himself as an appellate court cannot, of the weight to be given to the testimony of each witness.

Again, this case had been decided and had passed out of the consideration of the court and to make such state-

ment would require a re-examination of the entire record.

So that there are other reasons which evidently influenced the Supreme Court of the Territory of Oklahoma to make this refusal. It is a task almost impossible to perform.

The trial court found all of the issues made by the pleadings in favor of the plaintiff, the present appellee, and the Supreme Court of Oklahoma took that finding as its finding. (Page 7 of Motion.)

The appellee has filed the following motion:

IN THE SUPREME COURT OF THE UNITED STATES.

U. C. GUSS, J. W. MCNEAL, W. H. GRAY and FRANK H. GREER,
Appellants.

vs.

J. T. NELSON,
Appellee.

MOTION TO DISMISS THE APPLICATION FOR CERTIORARI AND DIMINUTION OF THE RECORD

Now comes said appellee J. T. Nelson, and moves the court to dismiss the motion of said appellants for certiorari and diminution of the records for the following reasons to-wit:

1st: The facts stated in said motion and the exhibits thereto attached do not authorize the relief demanded.

2nd. If the Supreme Court of Oklahoma is required by law to perform the duties requested it can not be so required upon a motion of this character.

3rd. The motion filed is not the proper remedy for the relief demanded.

4th. If special findings of fact were necessary they could have been obtained in the trial court upon request of the appellants, the defendants in the court below.

5th. The petition no where shows that there ever was a record in the Supreme Court of Oklahoma such as is suggested in the motion of the appellants.

J. T. NELSON.

By W. R. BIDDLE & GEO. S. GREEN,
Attorneys for Appellee.

TO APPELLANTS:

You will take notice that the appellee has filed a motion of which the foregoing is a copy.

J. T. NELSON,

By W. R. BIDDLE,
Atty. for Appellee.

We accept service of the foregoing motion and notice this 2nd day of February, 1905. Appellee to serve printed brief by Feb. 18, 1905.

FRANK DALE AND A. G. BIERLY,
Attys. for Appellant.

It will be observed that the Supreme Court of Oklahoma is not a party to this proceeding. The record sought to be obtained and certified by the Supreme Court of Oklahoma has never existed and the purpose of this writ is to cause a new and additional record to be made by the Supreme Court of Oklahoma. The Clerk of the Supreme Court of Oklahoma has certified and sent up all of the record that has ever been made in this case.

I

We think the parties have pursued the wrong remedy if they have any remedy whatever. If it is a duty that the Supreme Court of the territory is required under the law to perform, mandamus would be the proper remedy.

"A writ of certiorari being a writ requiring an inferior tribunal to certify up a record will issue as a matter of course if applied for in time, its purpose being to produce what exists in the lower tribunal which through some inadvertence has not been included in the transcript certified up."

Pellatrau vs. Jackson, 7 Wend. 478.

appear that Mr. Nelson has ever demanded or has ever asked for, or been willing to receive this royalty. It was paid, as we have shown, to Mr. McNeal as treasurer of this corporation. It was never disbursed by any order of the corporation, and in contemplation of law, they are still in Mr. McNeal's hands as treasurer of the corporation, to be paid to the holder of these stocks when a dividend is properly declared, and there is no evidence whatever that Mr. McNeal is not entirely responsible, or that there is any danger that the money will not be paid over when the dividend is legally declared by the board of directors of this corporation.

The judgment of the Supreme Court of Oklahoma, we contend, should be reversed and judgment ordered for defendants in the trial court, and they should be held entitled to deliver these stocks to Nelson on his request, and also to deliver to the proper secretary and treasurer of these corporations when elected the seal, books, etc., of these corporations and the royalty received from the Tulsa mine, which we respectfully ask.

Very respectfully submitted,

FRANK DALE,

A. G. C. BIERER,

Attorneys for Appellants and Plaintiffs in Error.

make findings of fact or conclusions of law and no declarations of law nor request to make findings of fact were requested of said courts. As there are no exceptions in this record that are suggested by the assignments of error herein, it is clearly evident that this court must affirm the judgment.

Marshall vs. Burtis, 172 U. S., 630.
Salina Stock Co. vs. Salina Creek Co., 163 U. S., 109.
Cohn vs. Daly, 174 U. S., 539.
Cannon vs. Pratt, 99 U. S., 619.
Thompson vs. Ferry, 180 U. S., 484.
Saltonstal vs. Birtwell, 150 U. S., 417.
Stoner vs. United States, 164 U. S., 380.

In said *Thompson vs. Ferry*, the syllabus of the case is as follows:

"The evidence will be assumed to sustain the judgment and the judgment will be affirmed by the Supreme Court of the United States on appeal from the judgment of a territorial court in the absence of any errors assigned or exceptions to rulings on the admission or rejection of testimony where the supreme court of the territory merely sets forth in its opinion the facts upon which it proceeds but there are no specific findings as such."

In said *Marshall vs. Burtis*, the Supreme Court in its syllabus states the following:

"Act of April 7, 1874, provides that the appellate jurisdiction of the Supreme Court shall be exercised by appeal except in cases of trial by jury. And that on appeal, instead of the evidence at large, the statement of the facts of the case in the nature of a special verdict shall be made by the court below and transmitted with the transcript of the record. Held, that in the absence of the findings of facts the court will assume that the judgment rendered by the territorial court on a trial without a jury was justified by the evidence."

In said *Cohn vs. Daly* the syllabus is as follows:

"Unless a statement of facts in the nature of a special verdict is made and certified by a territorial court where the trial was without a jury as required by 18 Stat. 27-28, the Supreme Court on appeal

must assume that the evidence supports the judgment. A so-called statement which merely embodies the evidence is not such as is contemplated by the statute."

In said *Saltonstal vs. Birtwell*, the second syllabus is as follows:

"Defective findings of fact made by the court where a jury is waived can not be helped out in a reviewing court by reference to the opinion delivered."

In said *Salina Stock Co. vs. Salina Creek Co.*, the syllabus is as follows:

"Where the record on appeal from the Supreme Court of a territory presents no statement of facts showing whether the facts found were sufficient to sustain the judgment rendered and no exceptions were taken to the rulings in the admission or rejection of evidence there is no question for review."

ASSIGNMENT OF ERRORS.

The case was tried by the court and a jury was waived. (R. P. 163). The twelve assignment of errors in this case on pages 3-4 and 5 of the printed record, challenges the attentions of this court to the conclusions of law made by the Oklahoma Supreme Court upon the evidence submitted. There is no error assigned as to the admission or rejection of testimony and as all of said assignments are upon the question of the conclusions of law found by the territorial Supreme Court upon the evidence submitted, under the rulings above quoted, this court should affirm the judgment.

SAME RULE IN COURT OF APPEALS.

Judge Thayer, for the court, in the case of *Walker vs. Miller*, 59 Fed., 869, uses this language on page 870:

"The record contains the pleadings, the special finding and judgment and a bill of exceptions showing the testimony upon which the findings of fact were predicated. But as no exceptions were saved by the bill of exceptions which we are asked to review, it might as well have been omitted from the record—Neither the Supreme Court nor the Court of Appeals, will undertake to determine a case like the one at bar, whether the special findings are supported by the

testimony contained in the bill of exceptions. For to do so would be simply to review the decision of the trial court on questions of fact rather than of law. By filing a written stipulation waiving a jury, the parties to a litigation may impose upon the Circuit Court the duty of making a general or special finding on questions of fact, but they can not impose upon an appellate court a like duty. The findings of the trial court, whether it be general or special, has the same conclusive effect, when the record is removed by the writ of error to an appellate tribunal, as a similar finding by a jury, and exceptions must be saved and presented in the same manner, either by objections to the introduction or to the exclusion of testimony, or by tendering declarations of law and obtaining a ruling thereon. These several propositions are well established by repeated adjudications."

Citing:

Insurance Co. vs. Folson, 18 Wall., 237-249.
Cooper vs. Omohundro, 19 Wall., 65-69.
Norris vs. Jackson, 9 Wall., 125-127.
Schuchardt vs. Allans, 1 Wall., 359.
Kearney vs. Case, 12 Wall., 275.
Burr vs. Navigation Co., 1 Wall., 99.
Lehnen vs. Dickson, 148 U. S., 71.
Martinton vs. Fairbanks, 112 U. S., 670.
Bank vs. Farwell, 56 Fed., 570.

See also,

Rodecker vs. Littauer, 59 Fed., 857.
Bowden vs. Burnham, 59 Fed., 752.

THE PLEADINGS AND FINDINGS.

If this court, however, is inclined to construe the pleadings and findings, it may be well to examine them.

The action was begun April 6, 1901, (Ptd. R. p. 15) and is a suit on contract. The petition alleges the execution of the contract; setting up a copy thereof; the payment of $500.00 as an option; the delivery of the property by Nelson to the plaintiffs in error; the failure of the plaintiffs in error to return the same *and the conversion of the same to their own use.* Also the failure to pay the $4,500.00 as provided in the contract. A copy of the contract is attached to the petition. (Ptd. R. p. 15-16-17).

The amended answer (Ptd. R. p. 22), upon which the case was tried admits that Nelson was in possession of the property; that the same was delivered to the plaintiffs in error, "in consideration of which the defendant paid to plaintiff the sum of $500.00 and agreed on or before March 4, 1901, to pay to plaintiff the further sum of $4,500.00 or in lieu thereof to turn back to plaintiff all the property delivered to him by defendant as aforesaid."

Then the answer pleads that the contract was simply, "a memorandum indicating in a general way the nature of said contract."

That the shares of stock were delivered to defendant at Guthrie National bank, "and defendants aver that prior to the 4th day of March, 1901, they duly notified plaintiff that they did not desire to make payment of the $4,500.00, balance due on said contract, at their option, but on the contrary desired to turn back to plaintiff all of said stock and other property mentioned in the petition, and defendants at said time duly notified plaintiff, that said certificates of stock and other property were at the Guthrie National Bank, in the City of Guthrie, the place where said property was delivered, and where it was to be delivered, and that defendants were ready and willing to deliver and turn back said property to plaintiff; and that the defendants duly tendered all of said property back to plaintiff at said place of delivery prior to March 4, 1901, under and by virtue of the terms of said contract."

Then the answer avers that, as the plaintiff Nelson did not appear to receive the property or send any other person to receive it, they expressed the shares of stock to plaintiff at Fort Smith, Arkansas, his last known post office address. And also wired plaintiff, that they had expressed the stock and also wrote him, "as to what disposition they should make of the books, seals and other property turned over to them by plaintiff." That Nelson refused to receive the stock.

Then the answer avers that the contract was fradulent and they plead a want of consideration. And that, by reason of the

want of consideration, and the fradulent character of the contract, the defendants were damaged in the sum of $10,000, for which they asked judgment.

The reply is in a general and specific denial. (Ptd. R., p. 25). Then it alleges, that the defendants visited Fort Scott, Kansas, where the general offices of the Coal Companies were, long before the contract was made, were thoroughly conversant with all of the records of the company; saw the opinions of attorneys as to the legality of the leases; examined the lands and talked with the president of the company, Colonel Brown, and knew all about the output of the mines. That, after the contract was made, they always treated the property as their own, electing themselves directors and officers of the company and received the income from the property of the Coal Companies. And that after the 4th day of March, 1901, the defendants went to Washington for the purpose of determining whether they should retain said property or return it to the plaintiff. And that they failed after the 4th of March to return said property back to this plaintiff and put him in the position he was, prior to the execution of the contract.

The reply further states, that previous to the execution of the contract, Nelson controlled a majority of the stock; that the board of directors were friendly to him; that he was about to open up more mines, and was seeking to obtain a promise from the Indian agents for leases; that relying upon the contract, time being of the essence thereof, after the 4th of March he sought other employment.

The foregoing is a brief synopsis of the pleadings. The case was tried before the District Court of Logan County, without a jury, and after an exhaustive trial the court found as follows:

(R p 163)

THE FINDING.

"And the court after hearing all the evidence and argument of counsel and being fully advised in the premises, *finds for the plaintiff on all of the issues in this action*, and finds that said defendants,

and each of them, are indebted to said plaintiff on the contract sued upon, and set out in his petition in the sum of $4,500.00, with interest thereon at the rate of 7 per cent per annum, from the 4th day of March, A. D., 1901."

This is the only finding in the case. Now if the court will consider this question we desire to submit the following authorities:

AUTHORITIES.

In *Haskins vs. Dern*, 56 Pac., 953, the Supreme Court of Utah decided a case almost on all fours with the case at bar, the syllabus being:

1. "A contract to return certain shares of stock within a time limited, or pay a fixed amount per share therefor, is not a bailment, and upon a failure to return the stock within the limit, the holder becomes liable for the amount agreed upon.

2. "Where a party, upon good consideration, binds himself to do a certain thing or pay a stipulated sum of money at his option, the contract being in the alternative, the sum named is not a penalty, and upon his failure to do the certain thing, is absolutely bound to pay the stipulated amount.

3. "Where a debtor has the election to pay, either the money or the property within a certain time, and he fails to exercise his option, and make a tender at the time fixed, he losses his election, and the obligee has the right to demand the money."

In *Stephen vs. Hertzler*, 19 So. 838, the Supreme Court of Alabama decide a case very similar. The syllabus of the case is as follows:

"Plaintiff contracted to sell defendant stock of a corporation, for a certain price, within a certain time, at defendant's option. Subsequently, he delivered the stock to the defendant, who executed a writing, acknowledging the receipt of the stock and agreeing to pay therefor according to the terms of the option contract, or return the stock within a certain time. Held, that on failure of defendant to return the stock within the specified time, he was liable for the price."

In this case they cite:

21 *Am. & End. Enc. of Law*, 647.

Foley vs. Felrath, 98 Ala., 176.

Tenn. Transportation Co. vs. Kavanaugh, 93 Ala., 324.

Also *Buswell vs. Bicknell*, 35 Am. Dec., 262.

for appeal was made on the 24th day of October, 1904, and an appeal allowed on that day. (Motion p. 3)

This motion therefore comes too late.

Generes vs. Bonnemer, 7 Wall 564;
Avendano vs. Gay, 8 Wall 376;
Flanders vs. Tweed, 9 Wall 425;
Kearney vs. Case, 12 Wall 275;
Bethel vs. Mathews, 13 Wall 1.

III

We desire to add that the suggested statement of facts in the nature of a special verdict which is incorporated in the motion for certiorari (pages 26 to 36 of Motion) in no way states the facts and is full of errors, and a controversy would arise at once if the Supreme Court of the Territory of Oklahoma was required to prepare such statement. And this controversy emphasizes the words of the court in the case of Generes vs. Bonnemer which are as follows:

"To permit the Judge to make a statement of facts on which the case shall be heard here after the case is removed to this court by the service of the writ of error or even after it is issued, would place the rights of the parties who have judgment of record entirely in the power of the Judge without hearing and without remedy."

So the appellee's motion we think should be sustained.

W. R. BIDDLE,
GEO. S. GREEN,
Attys. for Appellee.

W. P. DILLARD,
Of Counsel.

FILE COPY.

Supreme Court of the United States.

Office Supreme Court U. S.
FILED
OCT 10 1905
JAMES H. McKENNEY,
Clerk.

OCTOBER TERM, 1905.

U. S. GUSS, J. W. McNEAL, W. H. GRAY and FRANK H. GREER,
Appellants and Plaintiffs in Error,
vs.
J. T. NELSON,
Defendant in Error.

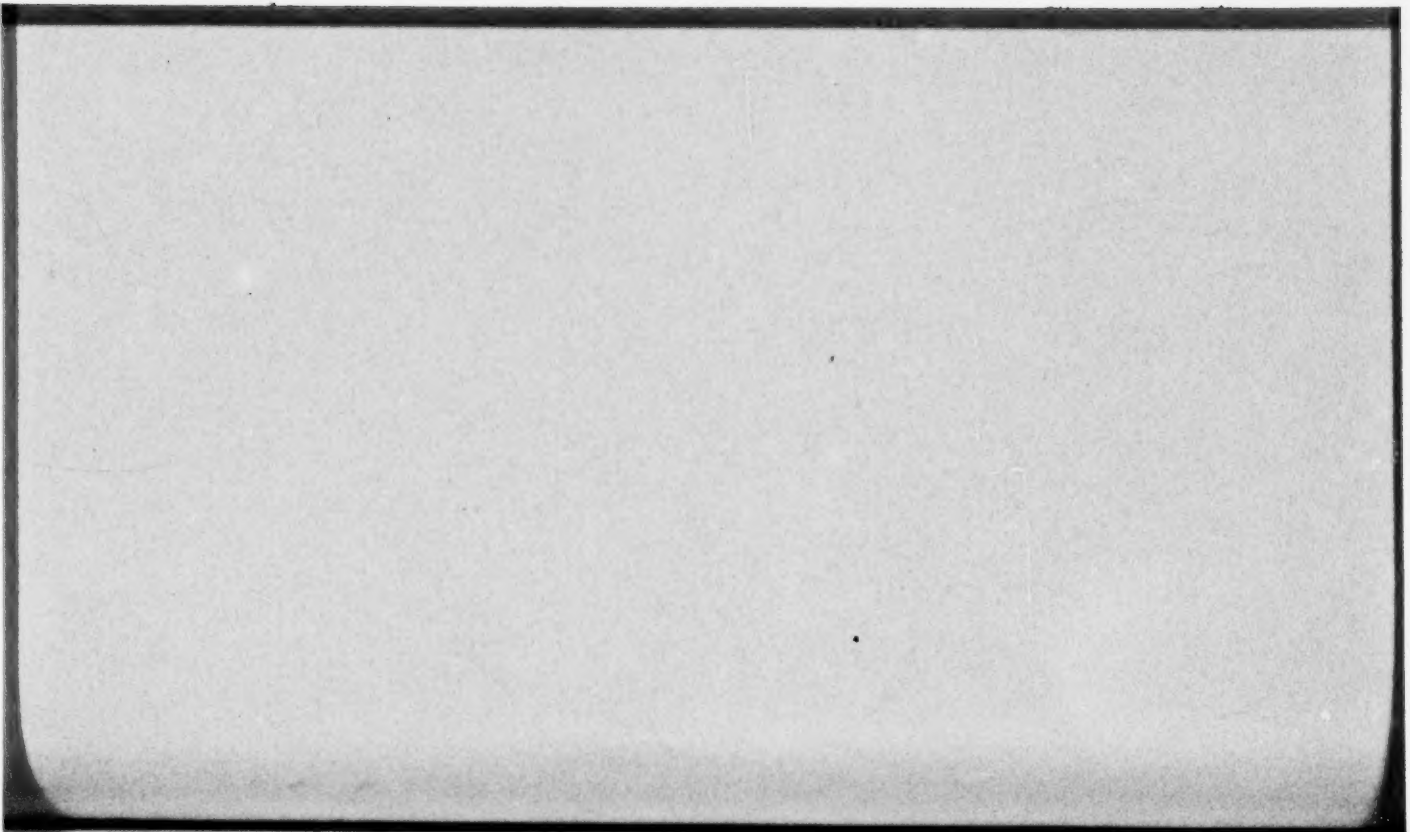
No. 124.

BRIEF OF DEFENDANT IN ERROR.

W. R. BIDDLE,
Attorney for Defendant in Error.

SELWYN DOUGLAS,
GEO. S. GREEN,
H. B. MARTIN,
Of Counsel.

Fort Scott, Kansas, Sept. 30, 1905.



Supreme Court of the United States.

OCTOBER TERM, 1905.

U. C. GUSS, J. W. McNEAL, W. H. GRAY and FRANK H. GREER,
Appellants and Plaintiffs in Error,
vs.
J. T. NELSON,
Defendant in Error.

No. 124.

BRIEF OF DEFENDANT IN ERROR.

This is an appeal from and writ of error to the Supreme Court of the Territory of Oklahoma. The appeal may be disregarded because the proper method of obtaining a review in the Federal Supreme Court of the final judgment of the Oklahoma Supreme Court under the act of May 2, 1890, is by writ of error and this court has no jurisdiction of the appeal.

Oklahoma City vs. McMaster, 25 Sup. Ct. Rep., 324.
Heicht vs. Boughton, 105 U. S., 235.

NO EXCEPTIONS IN THE RECORD.

The trial court of Logan County, Oklahoma Territory, was not requested and did not make special findings of fact or conclusions of law. The Supreme Court of the Territory of Oklahoma failed to

The Supreme Court uses this language with reference to certiorari.

"This writ is properly used to bring up to the court of error on an allegation by diminution, outbranches of the record or other documents and writing in the court below which have not been previously certified or sent."

U. S. vs. Child, 76 U. S. 661.

And in this case the Supreme Court refused a certiorari for the purpose of requiring the court of claims to complete its record and certify it up.

The Supreme Court has also decided that upon certiorari from Supreme Court upon diminution of the record the return may be made by the Clerk of the Court below and need not be made by the judge.

Stewart vs. Ingle, 22 U. S. 526;
Worchester vs. Georgia, 31 U. S. 515.

We think the appellants are not entitled to this writ and have mistaken their remedy, if they have any at all.

"Certiorari is a writ issued by a superior court to an inferior court of record requiring the latter to certify up to the former some proceedings therein pending or the records of the proceedings in some cause already terminated in cases where proceedure is not according to the course of the common law."

4 Enc. of Pleadings & Practice, p. 8.

"Certiorari is an extraordinary remedy resorted to for supplying defects of justice in cases obviously entitled to redress and and yet unprovided for by the ordinary forms of proceedings. It is also in the nature of that afforded by a writ of error. It is not a proceeding against the tribunal or an individual composing it, it acts upon the cause or proceedings in the lower court and removes it to the superior court for reinvestigation."

4 Enc. of Pleadings & Practice, p. 9.

"The writ is issued to bring up for review the record of the proceedings complained of and is not a citation to appear and justify the action of the tribunal as though a judgment was rendered against its members."

State vs. Dowling, 50 Mo. 134.

"The legitimate office of the writ is to enable the court to review and to correct the decisions and final determinations of inferior officers and tribunals and not to invest the court with the writ to exercise the powers thus conferred by statute on special officers and tribunals."

Delvin vs. Platt, 11 Abb. Pr. 400.

"The only office which the common law writ of certiorari performs is to certify the records of the proceedings from an inferior to a superior tribunal."

Highway Commissioners vs. Carthage 27 Ill. 140;
Petition of Tucker, 27 N. H. 405.

II.

If the appellants were entitled to a statement of facts in the nature of a special verdict by the Supreme Court of the Territory of Oklahoma they should have made an effort to obtain such record before the appeal was taken.

Upon this question we submit that the opinion and decision of the Supreme Court of the Territory of Oklahoma was made September 2, 1904. (Page 4 of Motion.)

The appellants made application to the Supreme Court of Oklahoma for a statement of facts in the nature of a special verdict on the 10th day of November, 1904, (Motion p. 23) more than sixty days after the decision was rendered. The motion shows that the application

Supreme Court of the United States.

No. 124.—October Term, 1905.

U. C. Guss, J. W. McNeal, W. H. Gray and Frank H. Greer, Appellants and Plaintiffs in Error,
vs.
J. T. Nelson.

Appeal from and in error to the Supreme Court of the Territory of Oklahoma.

[January 15, 1906.]

On May 28, 1900, at Guthrie, Oklahoma Territory, the parties to this action entered into the following contract:

"Memorandum of agreement made and entered into this 28th day of May, 1900, to wit, as follows: J. T. Nelson agrees on his part to turn over 25 per cent of the capital stock of the following coal companies located in the Creek Nation, to wit: Sapulpa, Choctaw, Catoosa, Wewoka, Red Fork, Neyaka, Concharty, Tulsa, Car Creek and Broken Arrow Mining Companies, to the following persons: U. C. Guss, W. H. Gray, F. H. Greer and J. W. McNeal. The consideration of the delivery under which the above listed stock and other stock as hereinafter described is as follows: This also includes the delivery of the records belonging to each of said above-named companies, the seals and other records that in any way belong to any of said companies. A payment of $500 is to be made in cash upon delivery of the above-named property, and additional property in the way of stock hereinafter listed. The $500 is to be considered an option on all said property until the 4th day of March, 1901. At that date the above-named parties are to pay to Nelson an additional sum of $4,500.00 (four thousand five hundred dollars), or in lieu thereof to turn back to said Nelson all the property delivered by him. In addition to the above-mentioned 25 per cent of the capital stock aforesaid, which the said J. T. Nelson represents he owns in his own right, he agrees to turn over and deliver enough more stock to make the aggregate sum of stock delivered by him under this contract as follows:"

(Here follows a list of companies and number of shares of stock in each.)

"The $500.00 above mentioned is to be earnest money, to be forfeited in case the balance of payment is not paid. Nelson also agrees to give U. C. Guss his proxy as director in each of the above-named companies until such time as it may be convenient for him to resign and Guss or some one else be elected to fill the vacancy."

On April 6, 1901, Nelson brought suit in the District Court of Logan County, Oklahoma Territory, to recover the additional sum named in the contract, After answer the case was tried by the court without a jury,

and judgment rendered in his favor on February 20, 1903, for $4,500 and interest. This was affirmed by the Supreme Court of the Territory, 14 Okl. 296, and its judgment was brought here both by appeal and writ of error.

Mr. Justice BREWER delivered the opinion of the Court.

The appeal must be dismissed. *Oklahoma City* v. *McMaster*, 196 U. S. 529.

Considering the writ of error, we remark that no rulings were made in respect to the admission or rejection of testimony presenting anything worthy of consideration. No special findings of fact were made by either the District or Supreme Court, the former finding generally the issues in favor of the plaintiff and rendering judgment upon such general finding, and the latter merely discussing the right of recovery upon the pleadings and such general finding.

Plaintiffs in error contend that this is a mere option contract, and that no liability could attach to them except upon an election to purchase the property, which they never made, but, on the contrary, declined to make, and notified the plaintiff thereof by letter. They call attention to the clause providing that "the $500 is to be considered an option," refer to the fact that there is nothing in the contract in terms mentioning "sale" or "purchase." There is always danger in applying a generic term to a contract and then subjecting it to the general rules controlling contracts of that nature, irrespective of its special stipulations. While an option is given by the contract, and the price paid for the option is named, yet it contains other clauses which are equally binding and from which liability arises. Option contracts are not all alike. As said in *Hunt* v. *Wyman*, 100 Mass. 198, 200, quoted approvingly by this court in *Sturm* v. *Boker*, 150 U. S. 312, 329:

"An option to purchase if he liked is essentially different from an option to return a purchase if he should not like. In one case the title will not pass until the option is determined; in the other the property passes at once, subject to the right to rescind and return."

In the contract before us, while an option running until the 4th of March, 1901, is given, for which $500 is to be paid, the stipulation for such option is followed by this: "At that date the above-named parties are to pay to Nelson an additional sum of $4,500 (four thousand five hundred dollars), or in lieu thereof to turn back to said Nelson all the property delivered by him." Here is an absolute promise on the part of plaintiffs in error to pay an additional sum of $4,500 at a specified date, or in lieu thereof to turn back the property. They did not return the property. The amount to be paid and the time of payment are expressly named, and that stipulation in the contract is as significant and binding as any other.

It shows that the option given is an option to return, and that if it is not exercised at the time named the sale is complete, and the promise to pay the balance of the purchase price becomes absolute. This construction of the contract is reinforced by the fact that not only was the stock to be delivered to the plaintiffs in error, but also Nelson agreed to give and did give his proxy as director in each of the companies, so that the possession of the stock and all the rights which attached to it passed to the plaintiffs in error, to be exercised by them subject to the right at any time before the 4th of March to return the property. *Haskins* v. *Dern*, Supreme Court of Utah, 19 Utah, 89, is directly in point.

We see no error in the ruling of the Supreme Court of Oklahoma, and its judgment is

Affirmed.

Mr. Justice McKenna took no part in the decision of this case.

True copy.

Test:

Clerk Supreme Court, U. S.

In *Buswell vs. Bicknell,* 17 Me. 344, 35 Am. Dec., 262, the syllabus of the case is as follows:

"Transfer of chattels, by which an option is given to the transferee, either to return or pay for the same by a certain day, is a valid sale and vests the property in the transferee."

See *Crocker vs. Gullifer,* 44 Me., 491.

69 *Am. Dec.,* 118.

McKinney vs. Bradlee, 117 Mass., 322.

In *Foley vs. Felrath,* 13 So. 485, 98 Alabama, 176, the Supreme Court of Alabama use this language in the opinion:

"An option to purchase, if the party to whom the goods were transferred should like, is very different from an option to return the goods, if he should not like them. In the first case, the title will not pass until the transferee determines the option, if seasonably exercised. In the other, the title passes, subject to the right to rescind and return them, which is in effect a right to resell to his vendor."

Quoting, 2 *Benjamin on Sales,* page 796, Sec. 915, Note 30:

Buswell vs. Bicknell, 17 Me., 344.

Hunt vs. Wyman, 100 Mass., 198.

See *Potter vs. Lee,* 53 N. W., 1047 (Mich.).

Henderson vs. Wheaton, 28 N. E., 1100 (Ill.).

Tex. P. Ry. Co. vs. Marlor, 123 U. S., 687.

In *Orvis vs. Waite,* 58 Ill. App., 504, the Court of Appeals of Illinois state the principle in the syllabus as follows:

"Where a person buys stock in an incorporated company with an option to return same to the vendor within a stated time and be paid a fixed sum therefor, an actual return or offer to return the stock is necessary before suing on the contract. Leaving the same at a bank and notifying the vendor is not sufficient."

See *Page vs. Shainwald,* 62 N. E., 356 (N. Y.)

The true rule and the reason for the rule is given in *Stephen vs. Hertzler*, 19 So., 841.

"The delivery and acceptance of the stock, having no other attribute than an election by the defendant to exercise the option, and performance by plaintiff of the agreement, the necessary import of the last agreement is, that defendant did exercise the option. And upon his promise to pay, time was given for payment as shown by the agreement. It is true the promise was to pay or return the stock within the given time. Most obviously the right to return was a mere condition of a sale. It was a condition subsequent, the performance of which would have rescinded defendant's obligation to pay the price. Its performance was subject alone to his election. The plaintiff was powerless to do any act to prevent or effectuate it. It must needs have been performed by the voluntary act of the defendant. Having failed to perform it, the defendant was discharged, and the promise to pay became absolute."

Mr. Wait, in his 5th Volume of Action and Defenses, 551, says, under title of Sale or Return:

"Where the goods are sold and delivered by the vendor, who takes the promises of the vendee to return them within a limited time, or a reasonable time, if none be limited, or pay a sum of money therefor, the property by the delivery vests in the vendee, subject to an option in him to return the goods within the time. If the vendee exercises this option by so returning them, the contract of sale falls to the ground and is defeated, as if it had never existed. If he does not, the sale becomes absolute, and the price of the goods may be recovered in an action for goods sold and delivered."

Citing:

Moss vs. Sweet, 16 Ad. and El. (N. S.), 493.
Jameson vs. Gregory, 4 Metc. (Ky.), 363.
Spickler vs. Marsh, 36 Md., 222.
Schlesinger vs. Stratton, 9 R. I., 578.
Buffum vs. Marry, 3 Mass. (C. C.), 478.
Chamberlain vs. Smith, 44 Penn St., 431.
Hall vs. Etna Mfg. Co., 30 Ia., 215.
Crocker vs. Gullifer, 44 Me., 491.

So that it would appear by abundant authority, that, the pleadings and findings fully support the judgment.

CONCLUSION.

That provision in the contract, that "The $500.00 above mentioned is to be *earnest money* to be forfeited in case the balance of payment is not paid," has reference solely to a condition of things, that would result in case the goods were returned within the time limited.

It in substance means that in any event $500.00 shall belong to Mr. Nelson.

In other words, that it shall be "earnest money." The authorities quoted, fully sustain this position.

Anderson, in his dictionary of law, defines "earnest" to be:

"A thing delivered to a vendor in assurance of the serious purpose to complete the contract of sale."

In the notes to this definition, he says:

"If the purchaser accepts and pays for the goods, the earnest money counts as a part of the price; if not, the amount is forfeited."

Webster defines it as follows:

"Something given by the buyer to the seller, by way of token or pledge, to bind the bargain and prove the sale."

Respectfully Submitted,

W. R. BIDDLE,

Attorney for Defendant in Error.

SELWYN DOUGLAS,

GEO. S. GREEN,

H. B. MARTIN,

Of Counsel.

Fort Scott, Kansas, Sept. 30, 1905.